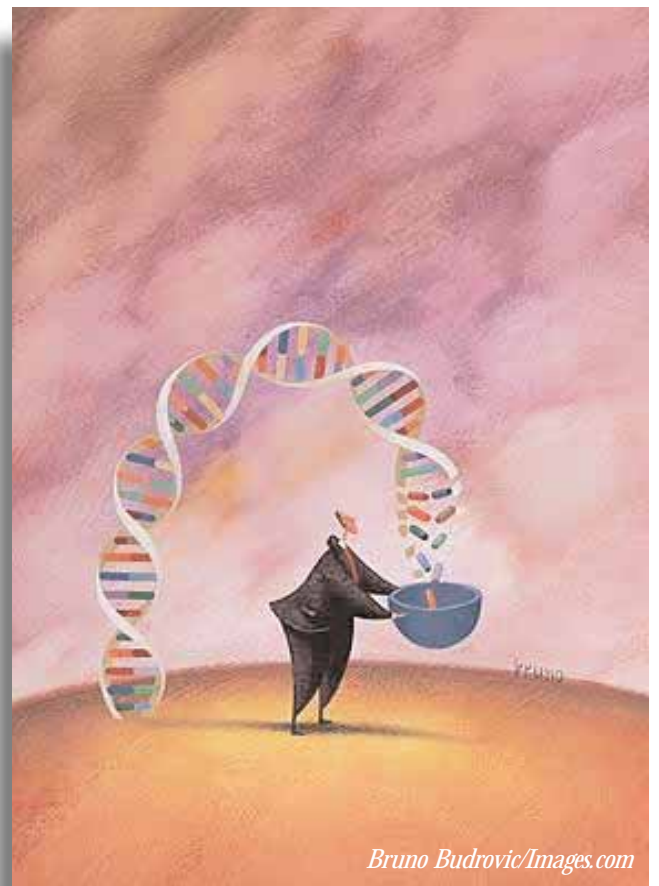


# Scientific Evidence in North Carolina After *Howerton*—A Presumption of Admissibility?

BY: KENNETH S. BROUN

O kay, I was wrong.<sup>1</sup> In *Howerton v. Arai Helmet, LTD.*<sup>2</sup> the North Carolina Supreme Court has stated unambiguously that this state has not adopted the landmark United States Supreme Court decision in *Daubert v. Merrell Dow Pharmaceutical, Inc.*<sup>3</sup>—at least as that case has been interpreted in the federal courts. The Court's message is clear enough, despite what this author has said: we are not a *Daubert* state. What is not nearly so clear is how a trial court should assess the admissibility of scientific and technical evidence in the future. The Court's opinion in *Howerton* leaves this fundamental question unanswered, although it gives some general indication of its inclinations.



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## The Similarities Between *Daubert* and *Howerton*

One of the things that makes a prediction about the future application of the principles set forth in *Howerton* especially difficult is that a reading of *Howerton* side-by-side with *Daubert* shows very little difference between the fundamental legal premises upon which the two cases are based. A fair conclusion is that the Court in *Howerton* was not rejecting the *Daubert* opinion, but rather the *Daubert* culture that has arisen in the federal courts since that case. The Court took pains to make sure that the North Carolina courts were not bound by federal precedent in dealing with issues involving scientific or technical evidence. The tests may be the same but trial court judges were warned against applying the rigorous standards for admission currently being applied in the federal system.

In *Daubert*, the Court rejected the then existing test for admissibility of scientific evidence, which required that the evidence must have gained “general acceptance in the particular field in which it belongs” in order to be admissible. The court of appeals had applied that test to exclude the evidence in question—expert testimony that the drug Bendectin can cause birth defects.<sup>4</sup> The Supreme Court substituted a test—based upon an application of Federal Rules of Evidence 702, dealing with expert testimony, and Rule 403, dealing with the exclusion of relevant evidence as unfairly prejudicial—of scientific reliability. The Court directed the trial court judge to engage in a “gatekeeping” function to determine whether the offered evidence is in fact reliable.<sup>5</sup> In an attempt to give guidance to the lower courts in making a determination of scientific reliability, the Court suggested a *nonexclusive* list of factors to be considered. Specifically mentioned were (1) whether the technique or theory can be or has been tested; (2) whether the theory or technique has been subject to peer review and publication; (3) the known or potential rate of error; (4) the existence and maintenance of standards and controls; and (5) the degree to which the theory or technique has been generally accepted in the scientific community.<sup>6</sup>

As articulated in *Howerton*, the North Carolina test is in fact virtually identical to the rule initially announced by the United States Supreme Court in *Daubert*.

*Howerton* reversed a Superior Court judge’s determination on a motion for summary judgment that plaintiff’s experts’ testimony would not be admissible at trial and that therefore summary judgment should be granted on liability. The case involved a claim by plaintiff that the severity of his injury in an off-road motorcycle accident was caused by a negligently designed and manufactured helmet. Specifically, plaintiff claimed that the flexible, removable guard across the chin and mouth area provided by the helmet was a defect. Plaintiff asserted that a rigid, integral chin bar structurally molded into the helmet, as in many other helmets, would have prevented his neck from rotating too far forward and thus prevented the paralysis that in fact occurred. In responding to the motion for summary judgment, plaintiff presented affidavits from four experts: one in motorcycle accidents and helmets, another in biomechanics, a third in design and manufacture of composite materials such as those found in motorcycle helmets, and the fourth a neurosurgeon. The trial judge carefully analyzed the proposed testimony of each of the plaintiff’s experts and concluded that the testimony of each was unreliable under the *Daubert* standards. As summarized in the dissenting opinion in *Howerton*, the trial judge’s findings were that

none of plaintiff’s expert witnesses had done independent research or used established techniques to substantiate their respective proffered hypotheses as to (i) how the injury occurred (ii) whether an injury would have been prevented had plaintiff’s helmet had a rigid mouth guard rather than a flexible one.<sup>7</sup>

The Supreme Court reversed because of the express reliance by both the trial judge and the court of appeals<sup>8</sup> on the *Daubert* principles. The case was remanded to the trial court for proceedings “not inconsistent with this Court’s opinion.”<sup>9</sup>

Although *Howerton* expressly and emphatically rejected *Daubert* as the guiding precedent in North Carolina, it is remarkable to compare the actual test approved in *Howerton* with that expressed in *Daubert*. In *Daubert*, the essence of the test is “scientific reliability.” The nonexclusive list of factors is set forth as some guidance to the lower courts.<sup>10</sup> In addition, the trial courts are warned that expert testimony may be excluded under Fed.R.Evid. 403

“if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury...”<sup>11</sup>

In *Howerton*, the Court, citing *State v. Goode*,<sup>12</sup> sets forth a three-step inquiry for evaluating the admissibility of expert testimony:

(1) Is the expert’s proffered method of proof sufficiently reliable as an area for expert testimony?... (2) Is the witness testifying at trial qualified as an expert in that area of testimony?... (3) Is the expert’s testimony relevant?<sup>13</sup>

In assessing whether evidence meets the first inquiry of reliability, the Court indicates that the trial court

should generally focus on the following *nonexclusive* “indices of reliability” to determine whether the expert’s proffered scientific or technical method of proof is sufficiently reliable: “the expert’s use of established techniques, the expert’s professional background in the field, the use of visual aids before the jury so that the jury is not asked ‘to sacrifice its independence by accepting [the] scientific hypothesis on faith,’ and independent research conducted by the expert.” (Emphasis added)<sup>14</sup>

*Daubert* tells the trial court to look for scientific reliability and suggests some “nonexclusive” factors to guide the inquiry. *Howerton* tells the trial court to look for scientific reliability and suggests some “nonexclusive” factors to guide the inquiry. The factors differ, but if they are truly nonexclusive, the differences are not really significant. Both courts remind the trial judge to consider issues of relevancy under Rule 403.

## The Differences in Approach Between the Federal Courts Following *Daubert* and *Howerton*

The difference between the federal and the *Howerton* approaches lies not in the underlying premises in the two cases, but rather in the difference between the way in which the federal courts have applied *Daubert* and the way in which the North Carolina Court has directed the lower courts to deal with the issue of the reliability of scientific and technical evidence.

There is little question but that many federal courts have come to apply the *Daubert* principles with a vengeance. The doctrine has been expanded to cover all

forms of expert testimony, not just novel scientific techniques.<sup>15</sup> The United States Supreme Court has also held that the trial court's decision with regard to reliability will only be reversed for abuse of discretion and that the decision on reliability may be based not only on the principles and methodology, but also on the analytical gap between the data and the opinion proffered.<sup>16</sup> Federal Rule Evidence 702 has been amended in an attempt to codify the Supreme Court rulings on the question.<sup>17</sup>

Federal courts frequently hold "*Daubert* hearings." At those hearings, judges conduct painstaking inquiries into the scientific and technical bases of expert opinions. Many federal cases have excluded scientific evidence, including the Ninth Circuit in the remand of *Daubert* itself. On the remand of *Daubert*, the court rejected the expert testimony, in part because the experts were testifying based upon opinions developed expressly for the purposes of that litigation.<sup>18</sup> Literally dozens of other reported cases have rejected expert testimony based on *Daubert* and its progeny and amended Rule 702.<sup>19</sup>

The intense inquiry into scientific reliability has been the subject of considerable judicial and scholarly unhappiness. The Court in *Howerton* refers to some of that criticism.<sup>20</sup> The thrust of the attacks on *Daubert* and its progeny has largely been directed to the difficult task that *Daubert* presents for the trial court judge, who is a lawyer and unlikely to be a scientist. For example, the *Howerton* opinion quotes from one federal case where the court opines

choreographing the *Daubert* pavane remains an exceedingly difficult task. Few federal judges are scientists, and none are trained in even a fraction of the many scientific fields in which experts may seek to testify.<sup>21</sup>

A great many legal scholars have come to a similar conclusion. For example, the *Howerton* decision quotes professors Charles A. Wright and Victor J. Gold:

It is unrealistic to think that courts can resolve disputes concerning the scientific validity of issues on the frontiers of modern science where even the experts may disagree. As a result, *Daubert* has been harshly criticized for imposing such a burden on the lower court.

The Court in *Howerton* shows its dis-

pleasure with the specter of turning judges into scientists noting that the application of the North Carolina approach is decidedly less mechanistic and rigorous than the "exacting standards of reliability" demanded by the federal approach.<sup>22</sup>

### Gatekeeping

The essence of the *Daubert* test in the federal courts is the "gatekeeping" function envisioned for the trial court judge. The Court set forth the essential inquiry:

Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a),<sup>23</sup> whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue. We are confident that federal judges possess the capacity to undertake this review...<sup>24</sup>

The Advisory Committee note to amended Federal Rule 702, emphasized this gatekeeping aspect of *Daubert*:

The amendment affirms the trial court's role as a gatekeeper and provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony.<sup>25</sup>

The only references to "gatekeeping" in *Howerton* are pejorative. For example, the court notes:

One of the most troublesome aspects of the *Daubert* "gatekeeping" approach is that it places trial courts in the onerous and impractical position of passing judgment on the substantive merits of the scientific or technical theories undergirding an expert's opinion. We have great confidence in the skillfulness of the trial courts of this State. However, we are unwilling to impose upon them an obligation to expend the human resources required to delve into complex scientific and technical issues at the level of understanding necessary to generate with any meaningfulness the conclusions required under *Daubert*.<sup>26</sup>

The problem with the North Carolina Court's rejection of the *Daubert* gatekeep-

ing function is that it is rejected on one hand, and yet established on another. The Court emphasizes the three-part test set forth in *Goode*.<sup>27</sup> The first part of that test requires that the expert's method of proof be "sufficiently reliable as an area for expert testimony."<sup>28</sup> The Court then outlines possible approaches to the reliability, including reliance on case precedent.<sup>29</sup> It also gives some guidance by referring to the "nonexclusive" indices of reliability set forth in earlier cases.<sup>30</sup> Thus, the trial judge is to have a role in assessing the reliability of expert testimony. If the testimony is found not to be reliable, it is to be excluded. That's gatekeeping.

What the Court in *Howerton* makes clear is that it is unhappy about the way in which gatekeeping has been performed in the federal courts. It objects to what it views as the "mechanistic and rigorous" application of the federal test.<sup>31</sup> In noting its failure expressly to adopt the *Daubert* approach in earlier cases, the court states:

We did not do so because we are not satisfied that the federal approach offers the most workable solutions to the intractable challenge of separating reliable expert opinions from their unreliable counterparts, or distinguishing science from pseudoscience, or of discerning where in this "twilight zone" a "scientific principle or discovery cross the line between the experimental and demonstrable stages." [citing *Frye*] Obviously, there are no easy solutions to the inherent difficulties of determining the legal reliability of scientific and technical hypotheses. While the law works towards conclusiveness and finality, science operates on an evolving continuum of probabilities and likelihoods that, in many instances, is not consonant with the legal paradigm. In light of this dilemma, our challenge is to define a standard of admissibility that does not create more problems than it solves and that does not raise more questions than it answers.<sup>32</sup>

The question is whether the Court defined that standard adequately in *Howerton* or whether it left the issue largely open for future cases. I suggest that, although we know some things about the admissibility of scientific and technical evidence after *Howerton*, the boundaries of the standard for admissibility are still very

much open.

### Some Suggested Guidelines for Assessing Scientific and Technical Evidence after *Howerton*

The trial judge in *Howerton*, the Honorable Wade Barber, conducted a thorough, *Daubert*-like analysis of plaintiff's proposed expert testimony. For example, in dealing with the proposed testimony of Professor Hugh H. Hurt Jr., an expert in motorcycle accidents and likely to be plaintiff's most important expert, the testimony was rejected for lack of quantification of the extent to which a full-face helmet would have prevented injury of the type suffered by the plaintiff, for failure to perform tests or independent research on the effectiveness of rigid chin bars in preventing neck injuries, for failure to subject his hypothesis to peer review, and for other, similar reasons. The Supreme Court did not expressly reject Judge Barber's findings, but rather reversed because his judgment was based on a "misapprehension of the applicable law"—to wit, *Daubert*.

Conscientious, effective trial judges like Judge Barber now know that they are not to rely on *Daubert*. But particularly given the substantial similarity in underlying premises between *Daubert* and *Howerton*, how should they decide whether scientific or technical evidence is reliable, a criterion still clearly imposed by North Carolina case law?

Following are some suggestions gleaned from *Howerton* and the cases and secondary sources cited in that opinion:

#### 1. Precedent

The Court in *Howerton*, directs the trial court to look first to "precedent for guidance in determining whether the theoretical or technical methodology underlying an expert's opinion is reliable."<sup>33</sup> Scientific theories or techniques that have previously been approved in this and other states do not have to be reexamined. The Court referred specifically to its recognition of DNA evidence,<sup>34</sup> bloodstain pattern interpretation,<sup>35</sup> blood group testing,<sup>36</sup> and fingerprints.<sup>37</sup> Presumably, the Court would also approve of cases decided by the court of appeals, such as *Taylor v. Abernethy*,<sup>38</sup> where the court let stand an opinion on handwriting based largely upon the long standing recognition of such testimony in the courts of this state.

The *Howerton* opinion also recognizes the other side of the coin—a theory or technique that has been recognized as inherently unreliable will be inadmissible. Examples are evidence of post-traumatic stress syndrome to prove that a rape has in fact occurred,<sup>39</sup> hypnosis,<sup>40</sup> or polygraph<sup>41</sup> evidence.

It is safe to say, in the absence of compelling new evidence, theories or techniques that have been approved in the past will continue to be approved; theories or techniques that have been rejected will continue to be rejected.

#### 2. Qualifications of the expert

The *Howerton* decision reaffirmed the importance of the need to qualify the expert in the appropriate subject matter area. In discussing this criterion, the court emphasized that the test for qualification was a relatively modest one. Citing *Goode*, the court reminded us of the considerable discretion vested in the trial court judge and that it "is enough that the expert witness...is in a better position to have an opinion on the subject than is the trier of fact."<sup>42</sup>

The battleground in many future cases involving scientific evidence is likely to involve the qualifications of the expert. If qualifications can be established, the battle is more than half won.

#### 3. Not on summary judgment

The fact that the trial court's decision that the plaintiff's expert testimony would be inadmissible caused summary judgment to be entered against the plaintiff in *Howerton* obviously troubled the Supreme Court. The Court expressed deep concern that an evidentiary ruling on the issue of the admissibility of expert testimony deprived the non-moving party—in this case, the plaintiff—of the procedural safeguards ordinarily in place on motions for summary judgment. The Court noted:

Where there are genuine, conflicting issues of material fact, the motion for summary judgment must be denied so that such disputes may be properly resolved by the jury as the trier of fact. *Kessing v. Nat'l Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971) ("Since this rule provides a somewhat drastic remedy, it must be used with due regard to its purposes and a cautious observance of its requirements in order that no person shall be deprived of a trial on a genuine disputed factual

issue.").

The Court also notes that asserting sweeping pre-trial "gatekeeping" authority under *Daubert* "may unnecessarily encroach upon the constitutionally-mandated function of the jury to decide issues of fact and to assess the weight of the evidence."<sup>44</sup>

The Court noted the criticism in other jurisdictions of the use of *Daubert* to deprive parties of a jury trial.<sup>45</sup> Indeed, although there are certainly cases in the federal system in which *Daubert* has been applied to predict the exclusion of evidence at trial and thus justify the granting of summary judgment,<sup>46</sup> the practice has not been without criticism even in the federal system.<sup>47</sup>

Whatever review of the reliability of expert testimony is undertaken at trial, the Court has effectively discouraged any such review at the summary judgment stage.

#### 4. No rigorous review at any point

By far the most difficult aspect of predicting the application of *Howerton* in future cases is determining the review to be given to new scientific theories or techniques—those presented to our courts by qualified witnesses for the first time especially where there is no significant precedent in other jurisdictions. The Court refers us to the nonexclusive criteria set forth in *Goode*.<sup>48</sup> But later in the opinion, it seeks to insure that the application of those criteria will be "decidedly less mechanistic and rigorous than the 'exacting standards of reliability' demanded by the federal approach."<sup>49</sup> Does the Court simply mean that a North Carolina judge does the same thing as a federal judge, only not nearly so painstakingly and carefully?

### A Presumption of Admissibility?

In rejecting the approach of the federal courts in *Daubert* cases, the North Carolina Supreme Court may have effectively shifted the burden of demonstrating reliability on the part of the proponent of the evidence to a burden of demonstrating unreliability on the opponent. Assuming that the expert witness has solid credentials and that there is no adverse judicial precedent with regard to the expert's theory or technique, the Court, without expressly calling it that, has created a presumption in favor of the admissibility of his or her testimony. Assuming offering counsel does his or her job in laying a foundation for admissibility,

the presumption will be a difficult one to rebut.

The criteria set forth in *Goode* support such a view. The *Goode* criteria suggests a review of the use of "established techniques," the "expert's professional background in the field," and "the use of visual aids before the jury."<sup>50</sup> Put as a directive to counsel presenting expert testimony: establish your expert's professional competence, have him or her use "established techniques," and embellish his or her testimony with visual aids. Assuming that counsel is able to pass these minimum thresholds, the only kinds of things that are likely to prevent admission of the expert testimony will be substantial and unrefuted scientific evidence to the contrary. By telling us that the rigorous inquiries spawned by *Daubert* are not to take place in North Carolina, the Court has also told us that merely presenting some scientific evidence to put the proffered expert testimony in doubt will not be sufficient. Judges are not to weigh the scientific merit of the evidence on each side. The burden is not only on the opponent to negate the reliability of the testimony. Arguably, based upon the Court's language in *Howerton*, the burden on the opponent of the evidence is a heavy one—to clearly establish the lack of scientific merit in the evidence.

An argument can certainly be made that such presumptive admissibility makes sense. The abuses of some federal courts were well documented by the Court in *Howerton*. Judges, especially judges such as those in North Carolina, who face a heavy case load without the luxury of law clerks, lack the resources of the federal judiciary to engage in scientific inquiry. The problem is not the quality of our judiciary, but the absence of resources. Judge Barber's intellectual efforts in *Howerton* were at a level to meet the standards of trial judges in any court.

The Court is also right to be concerned about decisions to exclude expert testimony on summary judgment. It rightly concerned the Court that a plaintiff could be denied a jury trial in a complex product liability action based upon a judge's view of the quality of the expert testimony presented in affidavit form on a motion for summary judgment. An over-rigorous use of the gatekeeping function asserted in *Daubert* certainly has implications as to the consti-

tutionally required mandate of a jury trial in both the federal<sup>51</sup> and North Carolina<sup>52</sup> constitutions.

Yet, some greater rigor than that apparently envisioned by the Court in *Howerton* is justified. The paradigm North Carolina case is probably not *Howerton* or *Goode*. Rather, it is *State v. Bullard*,<sup>53</sup> the first case to announce the "reliability" as opposed to the "general scientific acceptance" standard in North Carolina. An impressive expert, Dr. Louise Robbins, a professor of Physical Anthropology at UNC-Greensboro, testified that in her opinion, a bloody footprint found in an incriminating location was made by the defendant. The Court noted her extensive qualifications and found her technique to be reliable under the factors later enshrined in the *Goode* and *Howerton* cases: (1) she used scientifically established measurement techniques relied upon in the "established field of physical anthropology;" (2) her professional background and involvement as an expert; and (3) her use of photographs, models, slides, and overlays that were before the court and verifiable by the jury.<sup>54</sup>

The only problem with the acceptance of Dr. Robbins' testimony by both the trial court and the Supreme Court in *Bullard* was that Dr. Robbins was almost certainly a fraud. Her theories had in fact been seriously questioned at the time she gave her testimony in *Bullard*.<sup>55</sup> Several years after Mr. Bullard's conviction was affirmed, an article in the *American Bar Association Journal*, referred to her work as "thoroughly debunked by the rest of the scientific community."<sup>56</sup>

A rigorous application of *Daubert* may well have discovered the problems in Dr. Robbins' testimony. Her work had never been subject to "peer review" nor had there been any blind test of her abilities.<sup>57</sup> The North Carolina Supreme Court approved the admission of her testimony in 1984. It is possible that an application of even the *Howerton/Goode* principles would now exclude her testimony. But given the Court's warning in *Howerton* against a "rigorous" application of the reliability criteria, it seems unlikely. The Robbins testimony should have been excluded in *Bullard*. If it were offered today under the principles set forth in *Howerton*, it would be very likely again to be admitted—again wrongly. It is certainly not difficult to imagine other

instances of experts with impressive credentials presenting persuasive testimony in both criminal and civil cases that is in fact utter nonsense.

To a significant extent, the *Howerton* decision is justified based both upon the acknowledged abuses of *Daubert* in the federal courts and the limited resources in our own courts. Nevertheless, an application of the de facto presumption of admissibility in cases such as *Bullard* increases the risk of faulty expert testimony and therefore wrong decisions by our juries. Whether the Court will supply some criteria that will guard against such results in the future remains to be seen. ■

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## Endnotes

1. Kenneth S. Broun, *Daubert is Alive and Well in North Carolina, In Fact, We Beat the Feds to the Punch*, Fall NC Bar Journal 10 (2002).
2. 358 N.C. 440, 469, 597 S.E.2d 674, 693 (2004).
3. 509 U.S. 579, 113 S.Ct. 2786 (1993).
4. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 951 F.2d 1128 (9th Cir. 1991).
5. *Daubert*, 509 U.S. at 597, 113 S.Ct. at 2798.
6. *Daubert*, 509 U.S. at 593-94, 113 S.Ct. at 2796-97.
7. *Howerton*, 358 N.C. at 472, 597 S.E.2d at 695 (Parker, J. dissenting).
8. *Howerton v. Arai Helmet, Ltd.*, 158 N.C. App. 316, 581 S.E.2d 816 (2003).
9. *Howerton*, 358 N.C. at 472, 597 S.E.2d at 694.
10. See test accompanying note 5, *supra*.
11. *Daubert*, 509 U.S. at 595, 113 S. Ct. at 2798.
12. 341 N.C. 513, 527-29, 461 S.E.2d 631, 639-41 (1995).
13. *Howerton*, 358 N.C. at 458, 597 S.E.2d at 686.
14. *Howerton*, 358 N.C. at 460, 597 S.E.2d at 687, quoting from *State v. Pennington*, 327 N.C. 89, 98, 393 S.E.2d 847, 852-53 (1990) in turn quoting from *State v. Bullard*, 312 N.C. 129, 150-51, 322 S.E.2d 370, 382 (1984).
15. *Kumho Tire Co. V. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167 (1999).
16. *General Electric v. Joiner*, 522 U.S. 136, 118 S. Ct. 512 (1997).
17. Under the amendment, a witness qualified as an expert may testify only if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.
18. *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 43 F.3d 1311, 1317 (9th Cir. 1995).
19. See cases compiled in Saltzburg, Martin & Capra, Federal Rules of Evidence Manual 702.03.
20. *Howerton*, 358 N.C. at 464-69, 597 S.E.2d at 690-93.

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21. *Howerton*, 358 N.C. at 465, 597 S.E.2d at 690, quoting from *Ruiz-Troche v. Pepsi Cola of P.R. Bottling Co.*, 161 F.3d 77, 81 (1st Cir. 1998).
22. *Howerton*, 358 N.C. at 464, 597 S.E.2d at 690, citing *Weisgram v. Marley Co.*, 528 U.S. 440, 120 S.Ct. 1011 (2000) (appellate court may direct entry of judgment as a matter of law when it determines that expert testimony was erroneously admitted at trial).
23. Both Federal Rule of Evidence 104(a) and North Carolina Rule of Evidence 104(a) provide:
- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.
24. *Daubert*, 509 U.S. at 592-93, 113 S. Ct. at 2796.
25. Advisory Committee's Note, 2000 Amendment, Fed.R.Evid. 702.
26. *Howerton*, 358 N.C. at 464-65, 597 S.E.2d at 690. See also text accompanying note 44, *infra*.
27. See text accompanying note 13, *supra*.
28. *Howerton*, 358 N.C. at 458, 597 S.E.2d at 686.
29. *Howerton*, 358 N.C. at 459, 597 S.E.2d at 687.
30. See text accompanying note 14, *supra*.
31. *Howerton*, 358 N.C. at 464, 585 S.E.2d at 690.
32. *Id.*
33. *Howerton*, 358 N.C. at 459, 597 S.E.2d at 687.
34. *State v. Williams*, 355 N.C. 501, 553-54, 565 S.E.2d 609, 640 (2002).
35. *State v. Goode*, 341 N.C. 513, 530-31, 461 S.E.2d 631, 641-42 (1995).
36. *State v. Barnes*, 333 N.C. 666, 680, 430 S.E.2d 223, 231 (1993).
37. *State v. Roberts*, 233 N.C. 390, 397-98, 64 S.E.2d 571, 578 (1951), overruled on other grounds by *State v. Silver*, 286 N.C. 709, 213 S.E.2d 247 (1975).
38. 149 N.C. App. 263, 560 S.E.2d 233 (2002).
39. *State v. Hall*, 330 N.C. 808, 820-21, 412 S.E.2d 883 (1992).
40. *State v. Peoples*, 311 N.C. 515, 533, 319 S.E.2d 177, 188 (1984).
41. *State v. Grier*, 307 N.C. 628, 645, 300 S.E.2d 351, 361 (1983).
42. *Howerton*, 358 N.C. at 461, 597 S.E.2d at 688.
43. *Howerton*, 358 N.C. at 468, 597 S.E.2d at 692.
44. *Id.*
45. E.g., see *Logerquist v. McVey*, 1 P.3d 113, 131 (Ariz. 2000) and *Bunting v. Jamieson*, 984 P.2d 467, 472 (Wyo. 1999), cited by the Court in *Howerton*, 358 N.C. at 468-69, 597 S.E.2d at 692.
46. See, e.g., *Navarro v. Fuji Heavy Indus., Ltd.*, 117 F.3d 1027 (7th Cir. 1997). See also *First United Fin. Corp. v. United States Fid. & Guar. Co.*, 96 F.3d 135 (5th Cir. 1996) (admissibility of expert testimony governed by same rules on motion for summary judgment as at trial).
47. See *Cortes-Irizarry v. Corporacion Insular*, 111 F.3d 184, 188 (1st Cir. 1997) ("Given the complex factual inquiry required by *Daubert*, courts will be hard-pressed in all but the most clearcut cases to gauge the reliability of expert proof on a truncated record. Because the summary judgment process does not conform well to the discipline that *Daubert* imposes, the *Daubert* regime should be employed only with great care and circumspection at the summary judgment stage.")
48. See text accompanying note 13, *supra*.
49. *Howerton*, 358 N.C. at 464, 597 S.E.2d at 690.
50. See text accompanying note 13, *supra*.
51. United States Constitution, Amendment VII.
52. North Carolina Constitution, art. I, 25.
53. 312 N.C. 129, 322 S.E.2d 370 (1984).
54. *Bullard*, 312 N.C. at 150-51, 322 S.E.2d at 382-93.
55. See *Bullard*, 312 N.C. at 154, n. 16, 322 S.E.2d at 385, n. 16.
56. Mark Hansen, *Believe It or Not*, 79 A.B.A.J. 64 (June, 1993). In that article, the author reports that one student of expert testimony referred to her work as "hogwash" and as barely rising to the "dignity of nonsense." An FBI expert in fingerprints referred to her theories as "totally unfounded." Dr. Robbins died an untimely death in 1987.
57. *Id.* at 66.

# “Gotcha” Litigation: *Rethinking Rules 5, 7, and 56 of the N.C.R. Civ. P.*

BY JOHN W. REIS

**R**ules 5, 7, and 56 of the North Carolina Rules of Civil Procedure

are ostensibly designed to avoid sandbag litigation. Rule 7(b)(1) requires a motion to state its grounds “with particularity.” Rule 5(a1) requires a party to supply the opposing party a copy of any brief or memorandum of law on a dispositive motion at least two full days before the hearing. The rules were intended to prevent the “gotcha” tactic of filing a barebones motion and then supplying a

supporting brief or memorandum for the first time at the hearing. As demonstrated in the below example, however, these rules can occasionally fail of their intended purpose.



Mr. Young is in his first year of practice and practices as a sole practitioner in Bigcity, North Carolina. Nine months ago, he filed a commercial lawsuit for his first client shortly after passing the bar exam. The suit has been vigorously defended by the notorious Mr. Scorch, a named partner with the behemoth Bigcity law firm of Crush & Scorch. Trial is specially set for a date 12 days from now with no hope of settlement or continuance. It is a Friday afternoon and Young, realizing he must spend the entire weekend preparing for trial, decides to surprise his wife and son by coming home early this one night. As he heads for the door, he sees something come across his fax machine with Crush & Scorch letterhead on the fax cover sheet. He watches for the next printout. It is a one-page, one-sentence motion for summary judgment with a notice of hearing set for ten days from now—two days before trial. Scorch's motion simply states:

Defendant moves pursuant to Rule 56 of the North Carolina Rules of Civil Procedure for the entry of a summary judgment in its favor with respect to all counts of Plaintiff on the grounds that the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact on any of the Plaintiff's counts and that Defendant is entitled to judgment as a matter of law.

The motion neither attaches nor refers to any specific affidavit or any supporting memorandum or other documents.

This is Young's first time handling a motion for summary judgment. He goes back to his office and takes a close look at Rule 56. The rule does not require the attachment of any brief or other documents and does not require that the motion set forth with specificity either its factual or its legal basis. It also allows the hearing to be set as early as ten days from the date of the motion. Mr. Scorch did not coordinate this hearing date with Mr. Young.

Young then reads Rule 5(a1) to see if it requires the filing of a brief or memorandum in support of a dispositive motion. It does not. It simply allows a party who desires to submit a brief or memorandum to the court on a dispositive motion to serve the opposing party "at least two days before the hearing on the motion." Young considers the mindset of Mr. Scorch, with whom he has

battled all these months. Scorch has probably been working on his brief for weeks, possibly months, in advance of filing the bare-bones motion. Scorch will probably use the two-day rule to his advantage, springing a masterfully crafted brief on Young at the last possible minute—two days before the hearing as allowed under Rule 5(a1). Young will be working blind. He must serve his response brief just as he receives the opposing brief—two days before the hearing. The two briefs will cross paths simultaneously, neither addressing the other.

Young does not come home early. He digs further into the rules of civil procedure and finds Rule 7(b)(1), which states:

**(b) Motions and Other Papers**

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial or at a session at which a cause is on the calendar for that session, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

Young finds solace in the words "shall state with particularity the grounds therefor." Young quickly drafts a motion to strike Scorch's summary judgment motion for lack of compliance with Rule 7(b)(1) or, in the alternative, for continuance of the hearing. He asks his paralegal to file the motion and set it for hearing on the next available hearing date. The next available hearing date is the same day as the motion for summary judgment. Young considers. What if his motion to strike or continue is denied? What if the court finds that the "particularity" requirement is vague and that Scorch's anticipated brief effectively satisfies the requirement?

For the next ten days straight, Young buckles down to prepare his brief in opposition to the motion for summary judgment, sacrificing valuable time not only from his family but from more fully preparing for trial and handling his other cases. He is wary of being too verbose but he is afraid to leave out anything, not sure what Scorch intends to cover in his brief and afraid to leave any possible point unaddressed. At the two-day deadline, Young attempts to fax his voluminous brief and attachments to Scorch. Unfortunately, his fax machine breaks down. And his paralegal is sick today. He has no

choice but to personally deliver his bound brief and its attachments to opposing counsel and to personally deliver two copies of it to the courthouse, one for filing with the clerk and one for delivery to the judge.

To his surprise, the clerk actually refuses to file Young's binder or any of its documents. "Didn't you read Rule 5(d)?" asks the clerk. Young stares back in silence. The clerk reads him the rule. It allows filing of requests for admissions with the court, but then states:

[E]xcept that depositions, interrogatories, request for documents, and answers and responses to these requests may not be filed unless ordered by the court or until used in the proceeding. Briefs and memoranda provided to the court may not be filed with the clerk of the court unless ordered by the court.

Young carries the two binders to the hearing judge's chambers and hand delivers one of them to the judge's assistant, who frowns at Young's heavy binder.

At his office, Young finds his opposing counsel's 15-page memorandum. It packs a punch and it attaches an affidavit from the president of Defendant Corporation. Young reads Rule 56 again. It does not say that the *moving* party can serve an affidavit two days before the hearing. Rule 56(c) specifically says, "The *adverse* party may serve *opposing* affidavits at least two days before the hearing." Young is flabbergasted. What if the court deems the words "adverse" and "opposing" to include the moving party, which is, after all, adverse and in opposition to the non-moving party? Young does not want to take any chances. Wishing he had just one more opposing affidavit on a particular point, Young calls his client, Plaintiff, who has caught the same bug as his paralegal and is in no position to fully address Defendant's brief. Young prepares a Rule 56(f) affidavit stating that his client "cannot for reason of illness present by affidavit facts essential to justify his opposition." Young also files a second motion to strike or continue, this one on the basis that Scorch's affidavit is untimely and that Young cannot get an opposing affidavit in time.

At the hearing two days later, Judge Extreme Hypothetical calls Mr. Scorch to argue his motion for summary judgment before giving Young an opportunity to argue his motions to strike or continue. Young interrupts and asks the court to hear his

motions first. "Let's just hear what Mr. Scorch has to say first," says the judge. After extensive argument from Scorch, Judge Hypothetical looks to Mr. Young. Young begins by arguing his motions to strike. The judge then turns to Scorch, who argues as follows:

Judge, Rule 7(b)(1) is not clear on what is meant by "with particularity." It does not require the setting forth of particular facts or case law. In addition, it says in the last sentence that the rule is satisfied "if the motion is stated in a written notice of the hearing of the motion." That's a low standard. In addition, I believe Rule 7(b)(1) can be read in conjunction with Rule 5(a1) which allows a party to wait until at least two days before the hearing to provide a legal brief, which I did in this case and it was chock full of particular facts and case law. As to Mr. Young's argument about my client's affidavit being late because it was served two days before the hearing, nothing in Rule 56(a) requires that the affidavit accompany the initial motion. In fact, that provision uses the word "adverse party" to mean the Defendant. Here's what it says, judge:

A party seeking to recover upon a claim, counterclaim, or crossclaim or to obtain a declaratory judgment may, at any time after the expiration of 30 days from the commencement of the action or after service of a motion for summary judgment by *the adverse party*, move with *or without* supporting affidavits for a summary judgment in his favor upon all or any part thereof.

So when Rule 56(c) allows an "adverse party" to serve opposing affidavits, that allows the *moving party* or the non-moving party to do so.

Judge Hypothetical nods and denies Young's motion to strike.

Young replies, "Your Honor, I am also seeking a continuance on the motion for summary judgment because I had trouble getting an opposing affidavit from my client, who is sick. We served a Rule 56(f) affidavit in that regard."

Judge Hypothetical asks, "Who signed the Rule 56(f) affidavit?"

"I did, your Honor," says Young.

"*You* did. *You* signed the affidavit, not your client?"

"Yes, your Honor. My client is very sick,

your Honor."

"Mr. Young, Rule 56(f) says the affidavit is to be signed by the *party*, not the party's client. Your motion to continue is denied. Let's hear your response to Mr. Scorch's motion."

Young argues his heart out, doing his best to point out the many exhibits creating genuine issues of material facts. At the end of the argument, Judge Extreme Hypothetical is not persuaded by the freshman lawyer. He grants summary judgment, handing Young his binder of documents.

Young takes the binder to the clerk for filing to preserve the record on appeal. The clerk again refuses. In a panic, Young runs into the parking lot and grabs Scorch asking him to return to the courtroom. Scorch agrees. In Judge Hypothetical's chambers, Young asks the judge for leave to file the binder. Scorch objects, arguing that under Rules 5(a1), 5(d), and 56(c) the adverse party "may *serve*" opposing affidavits, briefs, and documents two days before the hearing but may not "file" them. Young responds that under Rule 5(d), the attachments can be filed if either "used in the proceeding" or "ordered by the court" and argues that because he "used" the documents at the hearing, they should be filed. Judge Extreme Hypothetical denies Young's request to file the exhibits but allows Young to file his bare brief.

In building his appellate record, Young reads appellate Rule 9(j) allowing the record to include "all papers filed" and appellate Rules 11(a)-11(c) allowing the record to be determined by agreement or approval of appellee and, if not agreed or approved, by filing a motion to settle the record on appeal with the judge whose order is being appealed. Scorch unreasonably refuses to agree to Young's proposed record. Young files a motion with Judge Extreme Hypothetical and prays.

Although this is an extreme example, rules that can be bent to extremes often are. The following are some simple suggested changes to Rules 5, 7, and 56 of the North Carolina Rules of Civil Procedure to address such a situation. Rule 56 should be amended to require (1) that a motion for summary judgment contain a statement of facts and memorandum of law specifying the particular factual and legal basis for the motion and attaching any affidavits intended to be relied upon at the hearing, (2) that the motion and

its supporting statement of facts, memorandum of law, and affidavits, if any, shall be filed and served at least 45 days before the time fixed for hearing, and (3) that the non-moving party shall file its response and any affidavits and documents it intends to rely on at the hearing, if any, at least five days before the date of the hearing or 40 days after the filing of the moving party's motion, whichever date is earlier.

Rule 5(a1) should track the Rule 56 amendments by requiring (1) that service of a brief or memorandum supporting a dispositive motion shall accompany or be incorporated into the motion, (2) that the time fixed for hearing shall be at least 45 days from the date of hearing on the motion, and (3) that the responding party's opposing brief or memorandum, if any, shall be filed at least five days before the hearing or 40 days after the moving party's motion, whichever date is earlier. Rule 5(d) should be amended to explicitly allow either party to file with the clerk copies of any briefs, memoranda, affidavits, or other documents that the party intends to provide to the court at a hearing on a dispositive motion. Rule 7(b)(1) should be more clear, requiring that the motion "shall specify the particular factual and legal grounds therefor."

These amendments would go a long way to reducing sharp and frivolous motion practice on dispositive matters in our courts. Not only would the moving party be required to be specific as to its basis for the motion, but the responding party would have no excuse for not adequately responding to the motion after being given ample opportunity to conduct additional discovery if needed, obtain opposing affidavits, and prepare an opposing statement of facts and memorandum of law specifically tailored to a moving party's dispositive motion. Legal memoranda and briefs that come before our judges will likely be more concise and better written. In addition, both the moving and the responding party are ensured a record on appeal that includes everything supplied to the judge. In a world of increasingly intense and complex litigation, civility is sometimes a casualty. But if our own rules of civil procedure allow such uncivil behavior, how can we assure that future Mr. Youngs will not face future Mr. Scorches? ■

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# Operation Iraqi Freedom II

BY CPT ROBERT C. KEMP III<sup>1</sup>

In the spring of 1989, I was a senior at J.F. Webb High School in Oxford, North Carolina. My heart and soul was in Annapolis, Maryland. I was determined and eager to start my collegiate career as a naval cadet at the US Naval Academy. Although a valedictorian with good SAT scores, I was denied an appointment to the Academy due to my poor eyesight. As an 18-year-old young man who academically achieved everything he wanted, I was devastated to learn of the rejection. From that point forward, I was bitter about everything military.

In September 2000, my bitterness finally subsided. My love for my country and our freedoms outweighed any resentment I still harbored. At the time, I was a practicing attorney in Greenville, North Carolina, and was engaged to a lovely woman, named Michele R. Lister. I enjoyed practicing law, but I felt a yearning to do my duty. The same duty honorably performed by my grandfathers in World War II.

Therefore, with permission from “She Who Must Be Obeyed,” I applied for a direct commission in the North Carolina National Guard (“Guard”) as a Judge Advocate General (“JAG”) officer.<sup>2</sup> In March of 2001 I was granted a life-long dream and was commissioned a first lieutenant in the Guard.

The stigma of being a guardsman was immediately evident. We were called “week-end warriors” and described as civilians who

played army once a month. This stereotype was not only untrue, but also existed since the days of the Vietnam Conflict.

Then September 11, 2001, happened.

Immediately, citizens everywhere approached me offering thanks and assis-

tance. I was grateful for the attention, but ashamed that I did little to earn it. We even had people insist on paying for our lunch or dinner at restaurants. Although not embarrassed at being an officer, I was admittedly uncomfortable at the attention being given



*CPT Kemp is one lawyer among many in this 30th BCT picture at FOB Caldwell, Iraq in April 2004. Other attorneys pictured are COL Conormon, MAJ Wells, MAJ Stevens (judge), and SGT Zuluagabetancur.*

to us.

The invasion of Afghanistan was swift and decisive with brave soldiers sacrificing their lives for the freedom and rights we enjoy as citizens of this great country. I was envious, as I wanted to be in the fight. I wanted to do more for my country. I felt like a third-stringer, watching the big game from the sidelines knowing I would never play.

Next, the United States turned their attention on Iraq. Whether you agree or not with the decision to continue the Global War Against Terrorism in Iraq, the decision was made by our president, as commander and chief of the Armed Forces. Therefore, our soldiers valiantly and bravely followed the orders of their leader.

In the fall of 2002, during the build up and preparation for Operation Iraqi Freedom, I was alerted for possible deployment in support of the mission. My family, especially my wife and mother, balked at the idea of a lengthy separation from me. However, I was excited and again eager to serve my country.

Unfortunately, we were not mobilized and, therefore, continued with our mission. At the time, our mission was to complete a rotation at the National Training Center at Fort Irwin, California. In May of 2003, we loaded our equipment and for three weeks conducted war games in the desert of California.

Below I address my experiences as a North Carolina National Guardsman, being called to serve in our federal forces by the President.

I enjoyed reading "A JAG's Journey in Iraq" by LTC Kirk G. Warner, Commander 12th LSO. However, based on LTC Warner's article, my experience differs in three main areas:

- 1) LTC Warner's experience occurred before and during the liberation of Iraq in Operation Iraqi Freedom I. I deployed into the Iraqi theater during Operation Iraqi Freedom II ("OIF II");
- 2) LTC Warner's experience touched the highest echelons of the Coalition Forces and Iraqi Government. Once in Iraq, his base of operations originated from Baghdad. My location was far from Baghdad, in Iraq's countryside, near the Iranian Border-away from the law makers; and
- 3) LTC Warner assisted in laying the foundation of Iraqi Law. I implemented

and taught the law to the local, rural populace.<sup>3</sup>

### Mobilization

When the 30th eSB returned from NTC, all the soldiers felt a relief and a satisfaction for a job well done. As soon as we returned, an air of anxiety started to fester. Whispers in the wind, talk among commanders and unusual troop movements began. Iraq was on our radar. Our faces changed from relief to worry. The worry was of the unknown and uncertain future. However, faith in our leaders was steadfast, and our work ethic did not falter.

Although my wife was upset, I was excited about the possibility of being deployed in support of my country. On September 20, 2003, we were officially activated and mobilized in support of Operation Iraqi Freedom II.

Our JAG section consists of three private attorneys, an assistant public defender, and a district court judge. Lieutenant Colonel Todd C. Conormon is an attorney practicing law in Fayetteville. LTC Conormon sacrificed his practice in order to deploy to Iraq. Major John Warner Wells II is an attorney in private practice in Greenville. His practice subsequently closed due to his service to his country. Captain David P. Stillerman is an instructor at East Carolina University and an attorney for Pitt County Memorial Hospital. Both of his positions placed on hold pending his service.

MAJ Henry L. Stevens IV, a district court judge from Warsaw, North Carolina overcame many obstacles in order to deploy and maintain his judgeship. Major Stevens received permission from the Department of Army in order to retain his seat on the bench. Thankfully, the Department of Army granted his request and allowed him to keep his seat. He received another gift as he ran unopposed in the November 2004 election. Lastly, I am an assistant public defender in Pitt County. I work for an employer, Donald C. Hicks III, a former marine himself, who is very supportive of my deployment and graciously held my position until my return.

This team of attorneys with a legal administrator, Chief Warrant Officer 3 Donald W. Mial who is an administrator of a juvenile detention facility, and six non-commissioned officers was gathered for one mission, which was to provide legal advice

to command and legal support to the soldiers.

Our mobilization started in Clinton, North Carolina, headquarters for the 30th eSB. After 14 days we moved to Fort Bragg, North Carolina, our home for the next five months. During the mobilization, the JAG section resolved various legal issues of soldiers, such as preparing over a thousand powers of attorney and wills, handling minor traffic offenses, reviewing lease agreements, advising on labor law concerns, and assisting with domestic issues.

Our other main mission was operational law. We prepared, gathered, and analyzed rules of engagement, laws of war, and conducted practical training exercises for our soldiers. Therefore, hours were spent reviewing and learning the Geneva Convention, Hague Convention, and other various international treaties. These treaties, in combination with guidance from higher headquarters, determine the rules we abide by and the laws we follow. Once we mastered these legal guidelines, we devised a format that an infantryman could easily and quickly utilize. These principles were critical as our brigade's future mission would be to support OIF II by stabilizing our area of operations.

Unfortunately, the aforementioned work is only the legal half. The other more difficult half is the transformation from a citizen to a soldier. The training was intensive consisting of reviewing common skills, such as first aid, protection from biological attacks, and familiarization with your weapon and the enemy's weapons. Moreover, much training was done outside of North Carolina with two war-fighting military rehearsals conducted in Germany and various conferences in Florida. Lastly, we were given a thorough medical screening and received a lot of shots for immunization purposes.

In January 2004, in preparation for Iraq, we traveled to Fort Polk, Louisiana, to participate at the Joint Readiness Training Center. This was our last test with it being a challenge in itself. Our transformation was imminent from an Armor Unit with tanks being replaced with Highly Mobility Multi-Purpose Wheeled Vehicles ("HMMWVs"). Legally, many issues arose during the military rehearsal, especially in this kinetic environment. Traditional army doctrine has the enemy wearing uniforms and fighting positions in a 180-degree battlefield. However, the fight has changed. Terrorists and insur-

gents do not wear uniforms and abide by no rules. The army has not only adapted, but has done it quite well and efficiently.

## Deployment

With much training and anticipation, we started deploying to the Iraqi theater the last week of February 2004. The journey for our soldiers has been historic. In a nine-month period, the brigade successfully completed a rotation at NTC, JRTC, mobilized for the first time in over 50 years, and deployed to a foreign combat zone. This accomplishment was a first for the Old Hickory Brigade.

The fog of war was upon us with much uncertainty, plenty of caution, and a healthy touch of fear. In the middle of March, the journey from Kuwait to Iraq was scary, but exciting. From our staging area in Camp Udairi, Kuwait, we convoyed for three days and two nights to our new home in the central area of Eastern Iraq. The Forward Operating Base ("FOB") was named KMTB (Kirkush Military Training Base) or Camp Caldwell. This base was our home for the next year.

The battlefield is now 360-degrees. The enemy could be anywhere. An innocent civilian and an enemy are wearing the same outfit. In other words, guerrilla warfare has entered the urban setting. Given these changes, the value of a JAG officer in a combat zone has greatly increased and has become a combat multiplier. This value can

be measured by the advice solicited by soldiers of all ranks regarding rules of engagement, treatment of detainees, processing of Iraqi claims by civilians, all types of law. Further, we process all violations of the Uniform Code of Military Justice ("UCMJ"), which is the law that all soldiers must follow. Therefore, most actions that are criminal in the United States are also criminal for soldiers on active duty, regardless of their location.

## Desert Life

Life in a dusty oven is an analogy of life in the desert. The dust particles are like baby powder. The heat is constant and suffocating with temperatures consistently in the high 120s and low 130s with a heat index in the mid-150s during the summer months. The fleas can be deadly. The disease of the deployment is leishmaniasis, a parasitic disease transmitted by an infected sand flea. Therefore, we treated our uniforms with permethrin, used deet to protect our skin, and slept under a mosquito net. All these measures, provided by the army, shielded our soldiers and reduced their chances of infection. Further, water is a premium with bottled water being a necessity. You will lose weight in the desert. This fact is inevitable.

Our home is near the Iranian border at a place far away from the urban terror of Baghdad, but with its own manner of terror, both isolated and ubiquitous at the same time. Rain is nonexistent during the sum-

mer. The sandstorms are sporadic, but consuming. How man can survive in these conditions is a testament to the survival skills of the local populace. Intense sandstorms, known as "brown-outs," sometimes occur requiring the use of goggles and scarves to cover your head—the only protection to the stifling dust.

This environment can be dangerous with the threat of dehydration prevalent and intestinal conditions possible. However, our troops brave the conditions and complete their missions, with much work occurring in the middle of the night, a little cooler than the days. The environment can be just as dangerous an enemy as are the insurgents.

## Combat Justice

The justice system for American soldiers in a battlefield can cause much consternation for commanders. The justice system is command driven. In most cases, soldiers accused of violating the UCMJ are likely to have more rights than a civilian in the United States. Although I wished soldiers would avoid trouble, inevitably, we did have a few soldiers discovering trouble, such as showing disrespect to a superior officer.

One such case was egregious enough that it warranted a court-martial. My mission was to prosecute a soldier by court-martial in Iraq. Although at first it sounds easy, logistically it was a nightmare. Imagine having to be responsible for all your witnesses and their transportation to a court located in a combat zone.

In order to travel in Iraq, one must have security. The witnesses are scattered all over Iraq. The amount of manpower to prosecute a court-martial is staggering. Although justice may be slow, expensive, and dangerous, justice must be completed in order to maintain good discipline within the ranks.

Therefore, I had the privilege and honor to prosecute the first court-martial in the North Carolina National Guard in over 50 years. I was also in charge of the logistical aspect of ensuring the witnesses were in attendance. This was no easy task. The witnesses had to travel via combat patrol through dangerous areas avoiding improvised explosive devices ("IEDs") just to deliver them to court. Additionally, the bailiff and security for the court had to be provided by the soldier's army unit.

The judge was Colonel James E. Pohl, who was the judge handling the Abu Ghraib



*CPT Kemp (right) greets North Carolina Congressman Bob Etheridge at Foward Operating Base (FOB)Caldwell, Iraq in April 2004.*

detainee abuse cases. I have much respect for this judge. He is a no nonsense but reasonable judge with fair but tough sense of justice. The irony is that I am a defense attorney in the civilian world but a prosecutor in the military world.

I am not qualified to explain the effort, planning, and supplies needed to execute missions involving combat patrols for the transportation of witnesses and evidence in cases. However, these soldiers risked their lives by going out on combat patrols to ensure justice was done. I was proud of all the soldiers and their safe passage to the court-martial, which was held in one of Saddam's Palaces in Tikrit, Iraq. We were indeed fortunate with the location as courts-martial in Southwest Asia take place in tents, chapels, and other various buildings.<sup>4</sup>

In one of the most beautiful, colorful, and architecturally enlightened courtrooms, my trial lasted a day with the soldier being found guilty of obstructing justice and disrespect to a superior commissioned officer. The soldier was reduced in rank and given 30 days. Of course, no confinement facility exists in Iraq for US service members. Therefore, the soldier had to be flown out of Iraq to the nearest confinement facility, which happens to be in Kuwait. At times it is difficult to imagine that not only are you trying a case on a battlefield with your courtroom under the threat of mortars or attacks, but now you must transport the convict/prisoner to a different country for him to serve his time in jail. I state again my contention that logistically a court-martial in a combat zone is difficult.

### Foreign Claims

The US Army Claims Services (USARCS) received responsibility for tort claims in Iraq on 17 June 2003.<sup>5</sup> The judge advocate general, based out of Washington, DC, supervises the claims offices. The rule of law is the Foreign Claims Act. The general rule is the US will not pay for claims made by local nationals if the claims arose from US combat activities. The Act further directs Foreign Claims Commissions, normally judge advocates, appointed to resolve claims, by using host nation (Iraqi) law to determine liability.<sup>6</sup> The problem arises as to the type of authoritative sources of Iraqi law for liability and damage determinations.

MAJ Henry L. Stevens IV was the foreign claims commission for the 30th BCT.

MAJ Stevens, a district court judge from the North Carolina 4th Judicial District, decided over 125 claims made by Iraqi citizens in the first six months of deployment and paid monetary compensation in the tens of thousands. His job description is similar to a claims adjuster with authority to settle claims in an amount \$15,000 or less. Although the limit is small when compared to claims settled in North Carolina, this amount is substantially more to the average Iraqi citizen, who makes an average annual income of approximately \$1,000.00 a year.

Obviously, when word reached the local populace that "money was being handed out," many Iraqis made claims in an attempt to take an advantage of the Coalition Force's deep pockets. Therefore, MAJ Stevens thoroughly reviewed each claim to determine their validity. Many claims were indeed fraudulent or greatly exaggerated. For example, a claim of \$10,000 for damage to a vehicle is extreme when the vehicle is 25 years old with a value of \$150.00.

### Detainee Operations

Detainee operations were the focus of many newscasts in America and throughout the world. The Abu Ghraib scandal was definitely a dark cloud over our armed forces. This abhorrent display is the exception and not the rule. The soldiers with whom I had the pleasure of serving handled prisoners with dignity and respect in compliance with the Geneva Convention and customary international law. Our role was to ensure that the detainee was treated appropriately and his case properly documented, in accordance with the rules of engagement and applicable international law.

These conditions require a paper trail, which is very difficult to construct in a combat zone. Further, the line soldiers who spend a majority of their time in the austere and harsh environment battling Anti-Iraqi Forces must produce sworn statements to support the reason for the detention. This task is especially difficult when the soldiers are tired and hungry. Moreover, despite the demands on these soldiers, they grudgingly produced the sworn statements. However, make no mistake about it, the soldiers I have worked with have always done their duty with enthusiasm, professionalism, and thoroughness.

Once the paperwork is complete, we

decide whether or not to prosecute the detainee in a local Iraqi Court or in a special court in Baghdad, called the Central Criminal Court of Iraq (CCCI). This court has national jurisdiction and primarily prosecutes Iraqi citizens or insurgents for crimes against Coalition Forces. However, even in this type of court, the judge and attorneys are all Iraqi. Therefore, Iraqis are enforcing their own laws.

### Iraqi People

The Iraqi people are tribal and secular in nature. Their focus is on their family, more so than their self. Their family achievements outweigh their personal accomplishments. Their people number over 24 million with 75% being Arabic, 20% Kurdish, and the remaining five percent a hodgepodge of other ethnicities. With Arabic power brings decisive division with a Shi'a majority and Sunni minority. Ironically, the Sunni minority was the ruling power as Saddam Hussein was their most famous (infamous) member.<sup>7</sup>

Islam has been the state religion with 97% of the population being either Shi'a or Sunni. Iraqi faith is unquestionable. Their belief is that God or Allah controls everything directly and in minute detail. This belief is sometimes mistaken as fatalism.<sup>8</sup> Although they value justice and equality highly; embellishing and exaggerating not only exists, but is also accepted in the realm of justice and business. These conditions create an atmosphere where religious leaders are the spheres of influence with control over economic, civic, and political aspects of Iraqi life. In other words, sheiks, ayatollahs, and imams are influential in many aspects of Iraqi society.

### Iraqi Security Forces

My working relationships with the local Iraqi Security Forces grew to the extent that I call them associates and some I call friends. In the Diyala Province, the Iraqi Security Forces consist of the Iraqi Army ("IA"), Iraqi National Guard ("ING"), Department of Border Enforcement ("DBE"), and the Iraqi Police ("IP"). As JAG attorneys, we interacted with all four of these organizations. One of my missions was to teach these components the law and its practical applications. I gave presentations and speeches to the Iraqi National Guard and New Iraqi Army. Those discussions proved

problematic at times due to the use of interpreters, as everything took twice as long. Further, many of the Iraqis were past soldiers of the former regime. Therefore, much deep-seeded bias and dubious practices had to be confronted and rebuked.

I wanted to empower them with pride, patriotism, and knowledge. I informed them that the eyes on the world are focused on their successes and failures. I instilled in them a sense of duty and honor as to being an officer of the army. I preached the philosophy of an army that answers to a civilian-led government that is led by a man or woman in civilian attire, not a military uniform. At first, this concept was difficult for them to comprehend, but they slowly and surely began to understand. These soldiers set the standard. If the Iraqi people see that their soldiers respect the law, then they will respect the law. These soldiers are the future of Iraq and I thoroughly enjoyed my experience in working with these brave Iraqi officers.

### Prior Iraqi Law

Iraq's law derives its origins from Syria and Egypt, which follows French codifications.<sup>9</sup> Therefore, its origins are civil in nature, as opposed to the common law followed by American Jurisprudence. Iraqi law, in principle, is modern and westernized. The former regime perverted this process for their benefit. For example, a law was codified giving some members of the Ba'ath Party civil and criminal immunity from all public and private actions. Moreover, all judges and prosecutors had to be approved by the Ba'ath Party.<sup>10</sup>

The two major Iraqi legal codes are the Iraqi Penal Code of 1969 and the Iraqi Code of Criminal Procedure of 1971. These Codes are still the law of Iraq with some modifications, enacted by the Coalition Provisional Authority ("CPA"), which eliminated some of the offenses. Further, no crime exists and no penalty is imposed for actions committed if no specific law fits the action.<sup>11</sup>

The offenses are categorized as crimes against the person, crimes against property, and crimes against the public trust. One unique aspect of their law is that criminal offenses punishable by less than five years prosecution may be deferred if the parties enter into a reconciliation agreement.<sup>12</sup> This law allows great flexibility to resolve

conflicts that may technically be criminal but in reality are civil.

Three levels of courts exist in Iraq, reflecting the "inquisitorial French approach": trial court, appellate court, and a Court of Cassation, their version of our Supreme Court. Further, their Court of Cassation does not rule on the "constitutionality or validity" of the law or review the evidence. The Court of Cassation determines whether the lower courts interpreted and/or properly applied the law.<sup>13</sup>

As in many civil law jurisdictions, the true power of the judiciary is the judges themselves. North Carolina's criminal system differs as power is shared between the judges and the prosecutors. In Iraq, an investigative judge conducts the investigation and questions witnesses. At trial, the prosecutor presents the testimony gathered during the previous inquiry and any other important documents. The amazing aspect of this procedure is that the trial is mostly a paper trial—no live witnesses.<sup>14</sup>

Ironically, the four Geneva Conventions of 1949, its two Protocols in 1977, the 1948 Genocide Convention, and the 1984 Torture Convention were ratified by Iraq. However, Iraq did not implement any national legislation on the subject. Therefore, under Iraqi law, the principles were never domestically applied to its citizens.<sup>15</sup> This legal maneuver allowed the former regime to receive world accolades for their involvement, but not abide by these principles in practice.

### Post Iraqi Law

After the successful overthrow of Saddam Hussein and his regime by Coalition Forces, the Coalition Provisional Authority ("CPA") was established. The administrator of the CPA was Paul Bremer, whose authority came from the CPA and United Nations' Security Resolutions, especially UN Security Resolution 1483 (2003) which authorized the exercise of powers by the CPA to include executive, legislative and judiciary authority.

Pursuant to this authority, Administrator Bremer promulgated and signed into law over 100 regulations, orders, public notices, and memoranda. These legal documents had the immediate effect of law and superceded all other Iraqi laws. These laws ranged from the regulation of Iraq's natural resources to the creation of new Iraqi min-

istries and departments. Although the CPA literally reconstructed the government, great caution was taken to ensure that the law, prior to the Ba'ath Party's perverse interpretation, would continue to be enforced. Therefore, subject to a few specific provisions being suspended, the Iraqi Penal Code and Iraqi Criminal Procedures still have the full force and effect of law.

On 8 March 2004, after much negotiating, the Transitional Administrative Law ("TAL") was signed by the representatives of the various tribes and regions of Iraq. The TAL is analogous to our Constitution in a limited sense. This document is currently the supreme law of the land. The document establishes the branches of government, enumerates the rights and freedoms of the Iraqi people, defines the role of the special tribunals and commissions, empowers the local governates and regions, and outlines the transitional period.<sup>16</sup>

The TAL is only temporary—a template for democracy. The intent of the TAL is to promote the future of all Iraqis. Although some scholars criticize this document for its content or absence thereof, one wonders whether or not our US Constitution would suffer the same level of scrutiny if ratified today. However, make no mistake; Iraqis know this law is only a roadmap for their own path in the land of a true republic/democracy.

The TAL clearly outlines the process and establishes the parameters of the elections by the Iraqi people. First, Iraqis are to vote for representatives, who will construct their own constitution. This constitution will replace the TAL. Once their constitution has been ratified, the next step is to create and launch an elected government of representatives. A full-fledge democracy in a region of dictatorships and sovereign rulers—a beautiful sight indeed.<sup>17</sup>

On 28 June 2004, a historic event occurred as sovereignty was transferred from the CPA to the Iraqi Interim Government ("IIG"). The IIG, empowered by the TAL, manages and governs the day-to-day operations of the Iraqi government. Their function is also temporary in existence. Once a constitution is ratified and a government is established, the IIG is abolished. However, the IIG was the Iraqi government during my tour in Iraq. They created laws, offered guidance to its application, and dictated policy. Indeed some of the same leaders of the temporary

government may be the future elected leaders of the new Iraqi government.

## Operational Missions

### *Search Warrant*

I was given the opportunity to prepare and participate in two missions that became a template of operations. The first mission occurred soon after the transfer of sovereignty. The mission was to seize records from an Iraqi bank. Although the more expedient way was to go to the bank and demand the records, this method is inconsistent with existing Iraqi laws as Paragraphs 72 and 73 of the Iraqi Law of Criminal Proceedings of 1971 required a search warrant.<sup>18</sup> Therefore, I traveled via military convoy to the town where the bank was located. Then, I coordinated the mission with the Iraqi Police. I had a signed affidavit by the 30th BCT administrative officer, outlining the supporting evidence for the search warrant.

Although this mission occurred on a Wednesday, I did not plan on it being a national holiday. However, being a determined and dogged attorney, I was on the hunt for a judge with the courthouse being closed. We first went by his home, which was empty. We checked another judge's house—nobody home. We then cruised to the bizarre in the middle of downtown looking for the judge in some of his known hangouts. Unfortunately, we were unsuccessful. However, we were persistent. As too many resources had already been expended, we waited for him at his house. The judge finally arrived at his home. At first, he was startled. I explained to him my purpose and he understood.

We finally got our search warrant and went straight to the bank manager's house. She was not pleased and did not want to come. This was a religious holiday. However, the Iraqi Police finally persuaded her, and she met us at the bank. She called in one of her tellers to access the computer in order to retrieve the records—mission successful. Moreover, the bank manager was wise, using the time with me to arrange the installation of a panic button in the bank. I thought the request was reasonable; therefore, we accommodated her request.

### *Mutual Aid Agreement*

My next mission was drafting a mutual aid agreement among Iraqi Security Forces. This mission was indeed delicate as distrust

and jealousy exists among Iraq's law enforcement agencies. However, cooperation among these agencies is imperative in the war against terror and its insurgents. Many instances of working inadvertently against one another on missions have occurred. Therefore, my goal was to prepare a document for all to sign outlining jurisdictional issues and assistance guidelines.

The document I proposed was very basic. Unlike mutual aid agreements in the United States, insurance language and liability concerns were absent. The point of this agreement was to arrange a medium for the parties to communicate and cooperate. Further, the document was not named a mutual aid agreement, but was instead called a standard operating procedure. This language avoided having the agreement ratified by their respective headquarters. Although I am sure agreements will originate from a higher agency in the future, the unknown factor is the time element. Further, during the interim time, this document will codify in writing the manner in which each of the law enforcement agencies conducts business.

Therefore, we met with the battalion commander of the local Iraqi National Guard and the chief of police of the particular village. The mission was a success as both parties agreed to sign the document. Admittedly, I felt on this day we had signed a peace treaty among the agencies. This process was a stepping stone in the right direction.

## Conclusion

I have been mobilized over one year and have been in Southwest Asia for over seven months. If you asked 18 months ago whether or not I would be in Iraq, I would have given you a funny look and a gasp of disbelief. However, my country called and I answered. Although I miss my family, I enjoyed the opportunity and experience of creating history in Iraq. I enjoyed participating with these fine American soldiers in the building of a new democracy. The journey was hard and tough times are in their future. However, our country has experienced tough times both from internal and external sources. History making is not easy. If our Founding Fathers were here today, they would be the first to tell us this.

Personally, I matured at a staggering rate in this environment. The manner in which I handle my affairs, express my faith, and

appreciate all I have has changed dramatically for the good. I have grown spiritually and my relationships with all who surround me have significantly developed. I love my family and I love my country. My actions here and now will affect events in the future. I just pray these events are peaceful in nature and prosperous to the region. The soul of the Iraqi people is a pure one. Do not let the few terrorists on television pervert your opinion of them. Their culture is honorable and their intentions are noble. The road to success will be a long one, but I am willing to help build it. ■

*Robert Kemp graduated from Wake Forest Law School in 1996. He joined the National Guard in March 2001 and has been mobilized since September 20, 2003. He returned from Iraq, but is currently on active duty and stationed at Fort Bragg. Kemp is assistant public defender for Pitt County.*

## Endnotes

1. The author wishes to thank the judge advocates who concurrently served in the 30th BCT for their support and leadership. The author further thanks the assistance of Captain Matthew J. Handley, 30th BCT's Public Affairs Officer.
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3. Lieutenant Colonel Kirk G. Warner, *A JAG's Journey in Iraq*, THE NORTH CAROLINA STATE BAR JOURNAL, Volume 9, Number 3 (Fall 2004).
4. Interview with Colonel James L. Pohl, Chief Military Judge, 5th Judicial Circuit, at FOB Danger, Tikrit, Iraq. These locations have been venues of his trials in theater.
5. Major Herring, Information Paper, Iraq Tort Claims Update (29 September 2003)
6. *Id.*
7. 1st INFANTRY DIVISION SOLDIER'S HANDBOOK TO IRAQ [UNCLASSIFIED], pp. 1-1, 2-1.
8. *Id.* at 1-2 and 2-2.
9. Professor M. Cherif Bassiouni, IRAQ POST-CONFLICT JUSTICE: A PROPOSED COMPREHENSIVE PLAN, p. 2, (28 April 2003)(Revised 2 January 2004), International Human Rights Law Institute, DePaul University, College of Law.
10. *Id.* at 4.
11. *Id.* at 3.
12. *Id.*
13. *Id.* pp. 3-4.
14. *Id.* at 4.
15. *Id.* pp. 4-5.
16. TRANSITIONAL ADMINISTRATIVE LAW (March 2004)
17. *Id.*
18. Paragraphs 72 and 73, LAW OF CRIMINAL PROCEEDINGS WITH AMENDMENTS (1971)

# Assumption of the Risk—Still Viable?

BY ROBERT E. RIDDLE

W

e live in an entitlement society with the word responsibility paling from our vocabulary. This mentality is pervasive and anytime we find ourselves wronged, even by our own choices, we are quick to put the blame on someone else. Our courts are filled with litigation seeking to assess liability to any-

one who may even remotely be the catalyst for an injury.

There once lived a doctrine called assumption of the risk which operated as a bar to recovery when the plaintiff engaged in an activity with which certain inherent risks were associated. This concept was especially applicable in sports related activities. For example, the sport of snow skiing is not an activity “for the timorous” and a participant assumes certain risks, such as falling, losing control, or otherwise activating a scenario that results in injury.



In contributory negligence states such as North Carolina, this doctrine seems to have been pre-empted by the contributory negligence issue which acts as a bar to recovery when the issue is answered against a plaintiff. It is, however still recognized as one of the affirmative defenses in Rule 8(c) of the Rules of Civil Procedure. In *Williams v. Nationwide*, the court submitted an issue of assumption of the risk although the jury answered the contributory negligence issue "yes," which ended their consideration of the remaining issues. *Williams v. Nationwide*, 182 S.E. 2d 653 (1971). In a State Tort Claims Act case arising out of a cheerleading accident, the court of appeals remanded the case with instructions to determine, among other matters, issues of proximate cause, contributory negligence, and assumption of the risk. *Davidson v. University of North Carolina*, 142 N.C.App 544( 2001) 543 S.E.2d 920. In an unpublished Fourth Circuit case, *Linkous v. Sugar Mountain Resorts, Inc.*, the court upheld a directed verdict against a plaintiff, skier, among other things, on the finding that he had assumed the risk and consequently was barred from recovery. (*Linkous v. Sugar Mountain, Resort, Inc.* CA 84-2060, 4th Circuit, 1984). *Linkous* cites *Swaney v. Peden Steel Co*, 259 N.C. 531 and *Smith v. Seven Springs Farm, Inc.* 716 F.2d 1002 (3d. Cir.1983).

Assumption of the risk applies where there is a contractual relationship between the parties. It extends only to those risks which are normally incident to the occupation in which the plaintiff engages. See *Krazek v. Mountain River Tours, Inc.*, involving a white water rafting accident (*Krazek v. Mountain RiverTours, Inc.*, 884 F.2d at 166) and *Waggoner v. Nags Head Water Sports, Inc.*, involving a jet ski accident (*Waggoner v. Nags Head Water Sports, Inc.*, 141 F.3d 1162 (4th Cir. 1998)). In the ski industry, for example, the lift tickets contain language which specifically disclaims responsibility for certain risks contained in the disclaimer.

Notwithstanding the *Linkous* case, the Western District of North Carolina (where most of the ski litigation occurs) has generally denied a request to submit an issue on assumption of the risk, although it is usually argued in some fashion. The lift ticket in the skiing industry

generally contains a disclaimer which warns against bare spots and slope conditions, and puts the skier on notice that the possibility of an injury is ever present. It is important to note the distinction between a pre-injury release agreement, which has been held to be contrary to North Carolina law, and the assumption language on the lift ticket, which simply warns of inherent risks that a skier is assuming. This distinction is discussed in the *Krazek* case. *Krazek v. Mountain River Tours, Inc.*, 884 F.2d 163 (4th Cir. 1989). The distinction is also recognized in *Alston v. Monk*, 92 N.C. App 59 (1988).

There is a reasoned distinction between agreements to assume inherent risks and contracts against liability for negligence which is discussed in *Alston*. *Alston v. Monk*, 92 N.C. App 59, 373 S.E.2d 463 (1988); *Poston v. Skews*, 49 Fed. Appx. 404 (4th Cir. 2002). The defense typically relies on the disclaimer on the back of the skiing lift ticket warning the skier of the risks inherent in the sport. These tickets are usually admissible in evidence and allow the ski area an argument that the cause of the plaintiff's injury was a risk which was contained within the disclaimer, and one that is inherent in the activity. *McWilliams v. Parham*, 269 N.C. 162, 152 S.E.2d 117 (1967).

North Carolina has a Skier Safety Statute (99C) which basically sets forth obligations of both the skier and the area operators. Like the motor vehicle statutes, a violation of one of the prescribed duties constitutes negligence. By way of illustration the duties of the ski area operator

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include posting notice of any "unusual conditions" at the top of each slope and marking any "hidden hazards known" by the operator to exist. These two specific duties give rise to most of the factual basis of plaintiffs' claims.

Conversely, the statute requires a skier to know the range of his abilities, maintain control, etc.

Because of the statutory prescriptions, the question that arises is whether 99C has created a separate set of rules for the ski industry, or are area operators bound by ordinary common law rules of negligence requiring a landowner to maintain his premises in a safe condition and to remove any defects which he either knows to exist, or should reasonably know to exist. *Roumillat v. Simplistic Enter., Inc.*, 331 N.C. 57 (1992). So, the question is, did the legislature alter the common law by enactment of 99C? The difference between the statutory requirement and common law negligence is that 99C does not contemplate *constructive notice*, but rather, requires actual notice on the part of the ski area. The *Linkous*

opinion notes that 99C is a codification of the duties of both ski area operators and skiers.

The ski accidents seem to run the gamut in terms of mechanism of injury, but the universal theme is a fall. Falling is an obvious inherent risk in the activity, but whether the fall is initiated by a hidden hazard, coming in contact with another skier, or colliding with a man made object are some of the theories on which an injured skier will base liability. The sport has traditionally been an activity for the hardy but has certainly developed as more of a commercial venture as more and more ski areas have developed. The glitz and lure of the sport, as well as the sophistication in equipment, grooming, and advertisement has led to a more fertile climate for litigation.

The seriousness of the injury typically drives litigation, as the highly damaged plaintiff feels compelled to try and recover his monetary damages. These cases often are presented on creative theories of liability with the assistance of a so called "expert" who suggests that there was some duty on the part of the area operator which was violated and therefore the proximate cause of the injury. Even when there is no industry standard to cite as being violated, the professional expert can improvise a standard based upon his background in the industry which he advances as the cause of the accident. Federal courts have become more cautious in allowing this evidence under *Daubert* and *Kumho Tire*. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.C. 2786 (1993); *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999) The North Carolina Supreme Court however has recently repudiated its adoption of the *Daubert* rule. *Howerton v. Arai Helmet Ltd.* (Supreme Court, June 2004).

In cases involving spinal cord injuries, the damages can easily be projected into the millions. These cases create an incredibly high stress level for the lawyers, since the plaintiffs' attorney often sees his damages with more clarity than the liability side of the case. Likewise, the defense counsel, who analyzes the liability as minimal or non-existent, suffers from a high stress level over the risk of a jury basing a verdict on sympathy. Although we know there is not a component of mercy in jus-

tice, the pressure builds to compromise this catastrophic injury case, which accounts for the fact that very few are submitted to a jury.

Juries do however follow instructions from the court and can and often do return verdicts that are logic based rather than simply driven by sympathy and compassion. Lawyers in these high profile cases need to be skilled in that old gamblers adage "know when to hold them and when to fold them." This may be the lawyer's intuitive skill to make that judgment call at exactly the right juncture even when it requires persuading the client that half a loaf may be the better choice.

The foregoing observations flow out of a recent case tried in the Western District Federal Court involving a ski accident that rendered the plaintiff a quadriplegic. (This case was reported in the September 6th edition of *Lawyers Weekly*.) The damages in the case were astronomical with a \$5 million health care plan, lost wages of \$1 million, and existing medical bills nearing \$800,000. In addition, Plaintiff had damages for future medical, pain and suffering, and loss of use of the body. No one in the courtroom could help but be moved to tears as the plaintiff described his life as a quad, relegated to complete dependency on someone else to perform even his basic biological functions. The plaintiff, a 55-year-old contractor with ten children, all of whom were in the courtroom, described the way his community had come to his aid during the six years since the injury, rotating the responsibilities associated with the daily life of quadriplegia.

The trial spanned five days and the jury deliberated for slightly over three hours. They asked for various exhibits on two occasions during their deliberations which were submitted in evidence to establish the appearance of the slope, snow conditions, an elevation survey, and various other documents associated with the cause of the accident. Although the requests for exhibits seemed to suggest that logic was trumping sympathy, negotiations continued while the jury was deliberating, but to no avail. (*Strawbridge v. Sugar Mt.*).

Some years earlier in another quad case against another ski area, the plaintiff

was skiing the edge of the slope, lost control, and ran into a tree that was located on the side of the slope. The liability theory was that the slope was designed in such a fashion, with a double fall line, so that gravity would naturally pull one into the tree in question. The plaintiff in this case was a remarkable early twenties young man who learned to paint with his mouth and had since earned considerable fame as a painter. This case settled halfway into the second week of trial before the plaintiff's case was tested with a directed verdict motion. (*Thomas v. Beech Mt.*) The settlement negated the jury's opportunity to determine the application of assumption of the risk in this case; however, there was considerable evidence that the plaintiff was skiing the good snow on the very edge of the slope and simply lost control.

Skiing is a sport where the skier is challenging the forces of gravity. His speed and control are his defenses to being drawn downhill by gravitational pull. The thrill of the sport is in the tension between control and gravity. Likewise, trying to reconstruct a ski accident is fighting the forces of gravity in the sense that it is an uphill exercise. Even without an issue and charge on assumption of the risk, the fact finders have an innate awareness that pitting oneself against the forces of nature exposes one to certain natural consequences. Whether applying the charge of contributory negligence or reading into it the assumption concept, juries have to confront the plaintiffs' voluntary participation in an activity inherent with risk. Likewise, lawyers dealing with these cases have to carefully weigh the risks and make the Solomon call in settlement negotiations. ■

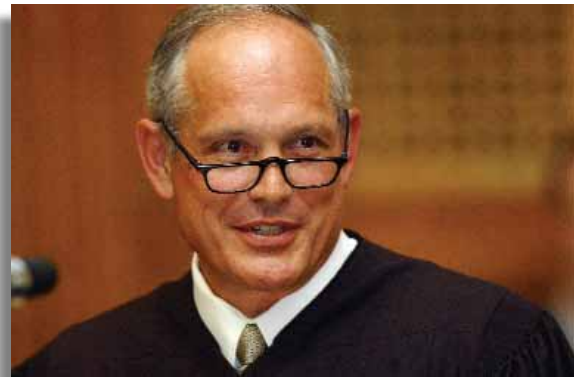
*Robert Riddle, who was licensed to practice law in 1958, is a family law specialist which is the current focus of his practice. However, he has done defense work for the ski industry for many years. He is a member of ASDA (Academy of Ski Defense Attorneys), has been legal advisor for the Southern Division of NSPS (National Ski Patrol System) for 26 years, and has represented ski areas in Western North Carolina in ski defense litigation for over 20 years.*

# Harold Brent McKnight Jr.—*A Life Remembered*

BY E. OSBORNE AYSUE JR.

It is altogether too rare that one is led by his religious faith to the law as a career. In that respect, Brent McKnight was indeed remarkable, for it was while studying for a graduate degree in theology at Wycliff House at Oxford under renowned theolo-

gian Bishop Stephen Neill, that he began to see justice as an end of religion and decided that he could best pursue justice by choosing the law as a career.



*8/25/03 US District Judge H. Brent McKnight addresses the packed courtroom during his induction ceremonies. (David T. Foster III/The Charlotte Observer)*

I first met Brent when he was a young undergraduate at Chapel Hill, when he was doing a summer internship in the international department of a local bank, for which I was handling some now long-forgotten matter. I remember knowing that he was a John Motley Morehead Scholar at Chapel Hill, who had been valedictorian of his class at Myers Park High School. I remember being impressed by his quiet seriousness. I was not surprised when I later read that he had won a Rhodes Scholarship.

We were almost two decades apart in age, and but for a few illuminating encounters over the years, I was never a part of Brent's life.

He spent half a summer with our firm as a summer law clerk, and though I had little contact with him, I do remember forming the impression that his future lay in something far different from the typical big-firm law practice.

I did not know at the time that one of his

Morehead internships was with Senator Sam Ervin's Watergate Committee, where, buried in a windowless room, under the supervision of Sam Dash, he read through 1,100 boxes of documents that had been produced in response to subpoena. It is a happy circumstance that he apparently did not relate that experience to the practice of law, or he might never have chosen to go to law school.

Aside from knowing where he was and what he was doing, I had little contact with him until the Federal Court system created a new office, the Magistrate Judge, and the local court qualified for two such positions. I was among his seniors in the local bar whose advice he sought about whether he should apply for the position. At the time, no one knew what these new positions would involve, or even how they would compare in stature and importance with the state court judgeship he already had.

He showed up for our downtown lunch

appointment obviously having walked up the hill from the courthouse on crutches. He told me solemnly that he had broken his foot in a karate match when he missed his opponent with a kick and hit a wall instead. That he had decided to make it up Fourth Street without calling to tell me of his problem spoke volumes. Years later, when I reminded him of that day, he broke into that shy smile that was his trademark and remarked, "Beth told me that I had no business in a karate match with a guy that much younger than I was!"

I appeared before him only twice during his tenure on the federal bench. A couple of years after he went on the bench, a discovery dispute my firm had been asked to take over in midstream landed on his docket. His carefully crafted and eminently sensible order told me that he had indeed absorbed and remembered some practical lessons from that distant summer's experience with the 1,100 boxes of paper.

Several years later, I represented one of the parties to a lawsuit that grew out of a power struggle over control of a public hospital. Both sides agreed to have the case referred to a mediated settlement conference. Judge McKnight was the judicial officer assigned to preside over the mediation. We quickly found that this experiment in judicial peacemaking in the local federal court had been principally his creation and that he had an unbroken string of successes in getting warring parties to resolve seemingly unresolvable disputes. In the end, he reluctantly declared an impasse in our matter. Although it was essentially the groundwork that he had laid that soon thereafter resulted in a settlement, he modestly refused to take credit for the outcome.

Then, in 2003, when Judge McKnight was nominated to a newly-created Federal district judgeship, I was assigned to take the lead in the confidential independent inquiry that the American Bar Association's Standing Committee on Federal Judiciary has, for over 50 years, conducted into the professional credentials of every nominee to a lifetime appointment to the federal bench.

In the course of that inquiry, I had the pleasure of reading much of what he had written in the course of his career and of talking in confidence with over 50 lawyers and judges about his professional competence, his reputation for personal and professional integrity, and his judicial temperament. At the end of the process, I spent about three hours talking with Brent in his office.

His office was a reflection of his life. A plaque signifying him as a member the Order of the Long Leaf Pine, the highest honor given by the state of North Carolina, hung in his outer office. In the course of our conversation, when he mentioned someone who had been his mentor, he would walk over to his bookshelves to pull out a book that person had given him.

I began that interview by asking Brent to pretend that we were strangers and to tell me the story of his life from the beginning. What I found out vastly exceeded what I thought I knew:

- A strong attachment to outdoors as he had known it on the Iredell and Union County farms which had been his grandparents' homes and unabashed pride in the Charlotte in which he had grown up.
- An inquiring mind that spanned a range of interests I would not have suspected

even in one who had been both a Morehead Scholar and a Rhodes Scholar—a founder of the Charlotte Astronomy Club while he was in high school, undergraduate majors in the unlikely combination of history and chemistry, a masters degree in the first year of his Rhodes Scholarship from Magdalene College at Oxford in Politics, Philosophy, and Economics, a second Oxford degree from Wycliffe Hall (a two-year course of study completed in one) in theology, a law degree, and an unfinished doctorate in theology, which he abandoned to pursue his career of public service.

- A devoted husband, who went out of his way to tell me of Beth's intellect, her faith, and her humanity.

- A proud father. The most striking decoration in his office, one to which one's attention was quickly drawn, was a photograph of his three sons, taken in what I recall as a sunlit meadow. (I already knew the place those boys held in his life. I still remember the oldest peacefully sleeping in a portable carrier between his and Beth's chair in the midst of a black-tie dinner at what would have been their first Fourth Circuit Judicial Conference.)

- A man who had devoted his life to public service—an assistant prosecutor for six years, and then a judge of the local district court, the "peoples' court," where the drama of human life with all its failings is played out daily; one of the driving forces behind the creation of the Battered Women's Shelter; a federal magistrate judge who soon after his appointment was trying complicated civil cases by consent, the ultimate indicia of trust and respect from the practicing trial bar, and who handled some of the most difficult criminal matters that came before the western district court; the only magistrate judge in the entire federal system appointed by Chief Justice Rehnquist to the committee that initiates the rules under which civil cases are tried in the federal courts; a member of the American Bar Association's Ethics 2000 Task Force; chair of the North Carolina Bar Association's Professionalism Committee; judicial advisor to the local program of legal services for the indigent—the list is almost endless.

- A man to whom "public service" was far more than those words imply: it was a means of living out his faith.

- A teacher who shared his knowledge and experience at universities that ranged from the University of North Carolina at

Charlotte, where he taught a class for many years, to the United States Military Academy.

- A writer whose list of published articles ran to five pages and covered subjects from the most esoteric to the intensely practical.

- A devoted churchman. While he was a student at Oxford, the Lutheran Church, in which he had grown up, designated him a delegate to a meeting of the World Council of Churches in Nairobi, Kenya. He told me a story about his trip home that bore for him an obvious symbolism. While he was exploring Ethiopia, he had bought what I recall him describing as a Coptic Cross from a soldier who wanted to sell it to get money to feed his family. Shortly afterwards, a civil war broke out, and all foreigners, their lives in danger, were rushing to leave the country. As he made his way through the crowd at the Addis Ababa airport, a guard spotted the cross, which he was wearing, and hustled him through the crowd and onto what turned out to be the last plane to leave.

- A man so modest that he could not write a 1,000-word essay about himself and why he wanted the Rhodes Scholarship and instead wrote about how reading Virgil's *Aeneid* had affected him.

- Indeed, modesty had precluded him from including in his resume that at the University of North Carolina he had won the William P. Mangum Medal in Oratory, an honor he shared with Governor Charles Brantley Aycock, Chief Judge John Johnston Parker, Chief Justices Walter P. Stacy and William H. Bobbitt, Justice Sarah E. Parker, Institute of Government founder Albert Coates, and another native Charlottean, Charles Bishop Kuralt.

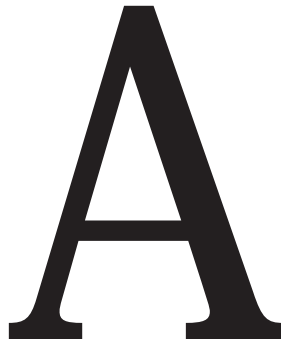
Douglass Hunt, former vice-chancellor of the University of North Carolina at Chapel Hill, in an article published last year, reflected that 1974 was among the most memorable of the many commencements he had attended because that was when Brent McKnight gave "the best speech by a senior class president I have ever heard."

Brent's confirmation as a district judge sailed through the United States Senate with no opposition. He was nominated on April 28, 2003, had his confirmation hearing before the Senate Judiciary Committee on July 22, was unanimously voted out of that committee on July 25, and was confirmed by the full Senate six days later.

CONTINUED ON PAGE 32

# Real Estate Scam

BY C. COLON WILLOUGHBY JR.



s society and methods of commerce  
change, so do the ways of the greedy and  
unscrupulous. Just as widespread use and  
acceptance of telemarketing and the inter-

net exposed us to new techniques of “confidence men,” changes in the residential real estate  
finance industry have created an unprecedented opportunity for large scale fraud.

Historically in North Carolina, lawyers have played a major role in the closing of residential real estate transactions and home buyers have sought out reputable local attorneys to handle these important events. The closing attorney, with professional schooling and licensing, was viewed as the person most in control of the purchase transaction and most likely to scrutinize it. Although that is not always the case in today’s marketplace, in the overwhelming majority of transactions, lawyers still conduct the closing, receive and disburse the proceeds from the transactions, and have special responsibilities to their clients.

More recently, real estate brokers have dominated the process and directed buyers to lawyers, appraisers, surveyors, insurance agents, and now, even lending institutions. With the changes in the real estate industry and the prolific growth of mortgage companies, home buyers rarely know any of the

professionals with which they are dealing, including their lenders. The lack of interconnectivity of the professionals has made the climate ripe for fraud.

When mortgage fraud happens, ordinarily the lender is deceived into believing that the buyer and seller are engaged in a legitimate “arms length” transaction, and that the information on the HUD-1 statement is an accurate portrayal of the transaction. In reality, the sales price is inflated, an unrealistic appraisal supports it, and the true distribution of the sales proceeds is concealed. Here is an example of how the scam may work.

A real estate broker selects a property to use in the scam. The house may be a newly completed house, or an unoccupied existing house that has been slow to sell. The seller’s complicity is required. An unsophisticated buyer is recruited by the real estate broker to purchase the house as an investment.

The buyer is told that tenants are waiting to move in and will rent the property for enough to cover the cost of principal, interest, taxes, insurance, and upkeep. Those tenants are also portrayed as potential buyers of the property.

Tenants are typically described as good people who currently have bad credit. After renting for a year, their credit will be satisfactory to allow them to purchase the home at a profit to the investor. Sometimes, the investor will even walk away from the closing with a check for a few hundred or a few thousand dollars. The transaction is pitched as a way to make money by “investing” and helping someone less fortunate. A loan is applied for in the name of the investor, and at closing the property is deeded to the investor, with the investor as mortgagor. The sales price and corresponding loan amount usually exceeds the market value of the property by \$30,000-\$75,000. The seller receives the market price and the excess proceeds are funneled to the real estate broker by the seller or closing attorney in a transaction that is not reflected on the HUD-1 statement. After the closing, the unscrupulous broker will tell the buyer/investor that the property is rented and may make loan payments (2-3) while the loan is being sold by the mortgage company to a distant financial institution. When the payments stop, the financial institution initiates collection, and at foreclosure the property is sold for a fraction of the debt. The unsuspecting investor’s credit is ruined and the lender takes the loss. All or most of the seller’s inflated proceeds go

to the real estate broker who initiated the transaction and sometimes small kickbacks or extra fees are given to the appraiser, mortgage broker and closing attorney.

The actual transactions may vary somewhat from the above-described example, but the underlying theme remains the same. While the closing attorney may not always be aware of the scheme, in some cases the attorney actually conceals the true nature of the transaction from the lender and the buyer/client. Even in those cases where the attorney is not a knowing participant, convincing the prosecutor, or the jury, that the experienced real estate lawyer was not part of the conspiracy and was duped by a real estate broker in multiple transactions may be a tough sale. Closing attorneys may be able to avoid those situations and detect the fraud being perpetrated on their clients and lenders by being

conscientious. Such things as unusual commissions to real estate agents, conflicts between the sales contract and the closing instructions, sales prices that are much greater than other houses in the neighborhood, and requests for unusual distribution of the closing proceeds are warning signs of fraud. Often, a few minutes of private consultation with the buyer/client before the closing will alert the closing attorney to irreconcilable issues that will reveal that the transaction is not what it appears to be.

Sadly, some of our brothers and sisters of the Bar have knowingly participated in these fraudulent schemes or maintained a "willful blindness" to the fraud. Under North Carolina law, fraud or attempt to commit fraud that exceeds \$100,000 is a Class C felony, and most residential real estate transactions exceed that amount. For a participant with no prior criminal history, the minimum presumptive sentence for

a single violation is not less than 58 months and not more than 79 months. Being part of the conspiracy is a Class D felony that nets a first time offender not less than 51 months. These penalties belie the idea that white collar criminals receive a slap on the wrist.

There are ongoing state and federal investigations looking at mortgage fraud in rural and urban parts of North Carolina. Some lawyers have already been charged, and it is likely that others will be implicated. As a profession we may be in a unique position to prevent some of these frauds and protect our clients and the public. Perhaps we should follow the lead of physicians whose oath requires "first, do no harm." ■

*C. Colon Willoughby is a State Bar Councilor representing the 10th Judicial District.*

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## Brent McKnight (cont.)

Senator Elizabeth Dole described him as a man with "a lifelong thirst for knowledge." Senator John Edwards noted his "temperance, fairness, attention to detail, and . . . abiding commitment to and concern for equal justice under the law" and called him "a consensus nominee who represents the mainstream of our state." Senator Orrin Hatch, the chair of the Senate Judiciary Committee, called him an "outstanding" nominee.

At his investiture, he described the role of a judge as a "sacred trust, a covenant with the people and with the principles of freedom and justice which our judicial institutions are charged to express."

Those who knew him, who had followed his career, were confident that his August 25, 2003, investiture as a federal judge for life was only the next step in a career destined for even greater things. Indeed, after he had been sworn in, I boxed up the copy of all the published and unpublished papers he had furnished for our committee's review and sent them back to him with a note urging him to save them to avoid killing more trees when he was asked for them again in connection with his *next* promotion.

Little did we know that ten short months

later he would be diagnosed with the cancer that five months later took his life.

The course of his medical treatment, the ups and downs that accompanied it, were reported regularly through a series of emails that originated in his church and were widely distributed among his friends and admirers. He worked almost to the day of his death. Five weeks before his death he went with his family to Myrtle Beach for Matthew's soccer tournament.

When he rose to respond for the Western District Federal Judges at a dinner given in their honor on November 18, no one in the audience, not even, I suspect Brent, knew that his heartfelt tribute to the "noble calling" that was his chosen profession and his exhortation to his audience to turn theirs into lives of service would be his valedictory. He had come not feeling well, prepared to leave after his speech; he and Beth were among the last to leave. Five days later he was hospitalized, his cancer having spread beyond further control, and four days later he died.

The long lines of people who waited in the cold to speak to his family, the more than a thousand people who came to the service in celebration of his life at Christ Covenant Church, were eloquent testimony to the regard in which he was held.

Among his honorary pallbearers were John Sanders, the retired director of the Institute of Government at Chapel Hill, who has devoted a part of his life to identifying students of particular promise, students like Brent McKnight, and mentoring them, and Peter Gilchrist III, the dean of the prosecuting attorneys in the southeast, to whose tutelage Sanders had steered Judge McKnight years ago.

In a now distant time, one of my mentors, the late Bill Mulliss, was wont to remind the young lawyers around him that their priorities, in order, ought to be "your Lord, your family, and your profession." Brent McKnight was one lawyer who clearly understood and lived that.

The outpouring of praise that accompanied his passing—from those who knew him as a lawyer, as a judge, as a churchman, as a friend—would take pages to recount. Perhaps his old high school principal, in a letter to *The Charlotte Observer*, said it best: "Judge Brent McKnight . . . represented all that is good in our city." ■

*Ozzie Ayscue Jr. practices with Helms Mulliss & Wicker, PLLC. This article was originally published in the January 2005 edition of the Mecklenburg Bar News.*

# Tom Dooley and the Hearsay Rule?

BY RICHARD H. UNDERWOOD

**T**he ballad of Tom Dooley (in real life Tom Dula) was popularized by The Kingston Trio in 1958. The Trio sold over six million copies, and the record is credited with ushering in a folk music boom in the early 1960's.

The Trio's version was not the earliest. According to an internet website for Wilkes County, North Carolina, the ballad was written around the time of Dula's hanging by a local poet by the name of Thomas C. Land. Presumably Land made no money off the song, but the Kingston Trio topped the charts, and their financial bonanza spawned a protracted legal battle which led to a settlement pursuant to which future royalties would ultimately go to collectors John and Allan Lomax, Frank Warner, and Frank Proffitt, all of whom claimed rights to the song. I am assuming that most of my readers are thoroughly familiar with the tune and the lyrics, and I will not lay them out here. I don't want to get sued.

This is probably the most studied and written upon of American murder ballads. Unfortunately, the tune does not tell the whole story of the crime by any means. It alludes to a love triangle ("the eternal triangle") but provides no details of this triangle, and only the slightest hint of motive. The lyrics also take it for granted that Tom was guilty of the murder of a young woman, Laura Foster (who is not named in the Kingston Trio version). Indeed, in his 1947 book *Folk Song USA*, Alan Lomax started the myth that Dula "made himself up a ballad, a confession of his crime." In the real case Tom pled not guilty, fought the prosecution (he was defended by a former governor of North Carolina), and maintained his innocence to

the end, even on the day of his hanging.

The real facts of the case are also quite sordid. Young Tom Dula had returned to North Carolina after serving in the Confederate Army; but his odyssey did not follow the story line of *Cold Mountain*. Tom was apparently a popular fiddler, and a womanizer. He was carrying on with Laura Foster and Ann Melton. Laura Foster had a poor reputation for chastity. It was said that she had "round heels." (I had to explain what that means to a puzzled Stanford Law Professor.) Tom had contracted syphilis from someone, and suspected that it was Laura who had passed it to him. He was heard to have threatened to "put through" (kill with a knife) whoever had given it to him. The body of Laura Foster had been found a few weeks after her disappearance in a shallow grave near "the Bates place" (wasn't that the place in the movie *Psycho*?). She had been stabbed in the left breast between the third and fourth ribs. A correspondent from the *New York Herald* reported that the murdered girl was pregnant. While there is nothing in the reported appellate opinions confirming this, it is fascinating that the *New York Herald* took note of the case. In any event, circumstantial evidence pointed to Tom, or Ann Melton, or both, as the killers. More on the subject of Ann's possible role later.

There was evidence that Tom and Laura were headed out to a fatal meeting. Among the witnesses was Betsy Scott, who testified that she had met Laura on the morning of the day she disappeared. Laura was riding her father's mare, and was carrying a bundle of clothes. Betsy was permitted to testify, over objection, that Laura was on her way to "the Bates place," and that Tom was going another way and that she expected to meet him at "the Bates place." After Tom was convicted, the

admission of this evidence was ruled to have been an error, and a new trial was ordered.<sup>1</sup> While the opinion of the Supreme Court is short and somewhat opaque (lot's of *res gestae* stuff, which would have amused the late Professor Irving Younger), the reasoning appears to have been that to the extent that *Laura's* out-of-court statements were offered to prove *Tom's* intent to go to "the Bates place" to meet Laura and to prove the fact that *he* did go there, the evidence was inadmissible hearsay.

This little case is a gem of a find for any teacher of evidence law, because it presents a variation on the classic case of *Mutual Life Insurance Co. v. Hillmon*,<sup>2</sup> a favorite case for law professors.<sup>3</sup> *Hillmon* deals with the famous hearsay exception endorsing the use of an out-of-court statement by a declarant to prove the *declarant's* intent to do something in the future, which is then taken as some evidence that the declarant acted in a manner consistent with his or her prior declaration of intent. In the *Hillmon* case, Hillmon's widow was trying to prove that Hillmon died from an accidental gunshot wound at Crooked Creek, Kansas, and that she was entitled to the proceeds of several life insurance policies. Mutual Life refused to pay, contending that the dead body was that of one Walters, and not Hillmon, and that the plaintiff and others were actually attempting to pull off an insurance fraud! At issue were letters from Walters to his sister and to his fiance stating (a) that he intended to go to Crooked Creek and (b) that he intended to go with Hillmon. The admissibility of (a) was not that controversial, but the admissibility of (b), *which the Supreme Court also endorsed*, was very controversial, and continues to be controversial to this day. Here is what one team of modern commenta-

tors has to say:

Here is the rub: What someone says can only prove what he and another did if used to support both forward and backward-looking inferences. The forward-looking inference is that the speaker acted as intended, which is fine. The backward-looking inference is that he had already met the other person when he spoke, and that the two had agreed to do something together (the other had spoken words indicating his intent), and that both later acted accordingly. These inferences are not fine, and apparently the framers of ...[Federal Rule of Evidence 803(3)] ... meant to reject *Hillmon* in its broadest reach.<sup>4</sup>

Apparently the North Carolina Court that decided *Dula's* first appeal (25 years before *Hillmon* was decided) may have held views that are consistent with those of the drafters of the modern Federal Rules of Evidence (although it is debatable whether they knew exactly what they were doing). It was the use of Laura's out-of-court statements to prove *what Tom Dula did* that the court found offensive. In the later appeal of his second conviction the court ruled that it was proper to admit Laura's declaration of her intent to go to "the Bates place" to prove that she probably went there.<sup>5</sup> On the other hand, that was never in doubt. There was apparently no serious question that it was her body that was found near "the Bates place," although the body was badly decomposed and the forensic evidence was slim by today's standards.

The "triangle" in the case was not one of two men (one a jealous killer) and a woman, but rather one of one man and two women. John Foster West<sup>6</sup> theorizes that Ann Melton, who was jealous of Laura Foster, may have been the killer, although Tom would certainly have been an accessory after the fact by disposing of the body. In any event, West argues that the circumstantial evidence against Tom did not "exclude every reasonable hypothesis of innocence," which is a required jury charge in many states, though not as a matter of US Constitutional law.<sup>7</sup> The evidence against Tom certainly looks weak by today's standards. Nowadays jurors expect DNA, fingerprints, and satellite photos of the defendant in the act. But we have to be careful when we judge old cases in light of today's technology. Tom may have left all kinds of evidence behind.

Another popular theory has been advanced by Doc Watson, the famous folk

singer. He claims, based on stories he heard when he was growing up in the same area, that there was actually a rectangle of intrigue. He claims that Sheriff Grayson had courted both of the women, and that he had a crush on Ann Melton. The suggestion is that there may have been some kind of conspiracy—at least a conspiracy of silence. Watson claims that Sheriff Grayson later married Ann Melton. He also claims that on her death bed she confessed the killing to Grayson, who was so disturbed by her revelations that he left North Carolina.<sup>8</sup>

Watson's version is pretty much demolished by West, who points out that Grayson, who arrested and held Tom (without the authority of the law, according to West), was Colonel Grayson. The sheriff of the county was one William Hicks. West also debunks a story that describes the person who did the detective work and made the arrest as a "Yankee" schoolteacher named Bob Grayson, who had a thing for Laura Foster. This myth, like the erroneous "ballad as a confession" story, can also be traced to Alan Lomax's imaginings. West insists that Ann Melton died while she was still married to her first (cuckold) husband, James Melton, and that she died of tertiary syphilis. This is consistent with West's evidence that Ann Melton, as well as Tom Dula, was infected with "The Pock," and blamed Laura. Curiously, Pauline Foster, a visitor who was a cousin of both Ann Melton and Laura Foster, was also infected. The "truth" about who did what to or with whom is obviously lost in time.

By the way, Tom Dula was not hanged "from a white oak tree" as the song suggests, but from a makeshift gibbet built near the old depot in Statesville, North Carolina (there had been a change of venue from Wilkes County because feelings there cut against Tom getting a fair trial).

The hearsay issue in Tom's case came up over 100 years later in the North Carolina case of *State v. Vestal*.<sup>9</sup> In that case the murder victim's wife was permitted to testify that the victim had said just before his murder that he was going on a business trip to Wilmington, Delaware, and that he was going on the trip with defendant Vestal. The Supreme Court of North Carolina held that the victim's, Pennisi's, statements to his wife were admissible in the prosecution of Vestal for his murder "since they, if true, show that Pennisi left the house to join the defendant on a trip to Wilmington, Delaware, concerning the busi-

ness matter in which they were interested." The defendant brought the *Dula* case to the court's attention, without any mention of "Tom Dooley," but the court gave the case short shrift, noting that it had been decided "more than a century ago" and that while it was still good precedent "insofar as the *res gestae* exception is concerned," it was no longer compelling in light of the *Hillmon* decision and its progeny. In a strong dissent, Chief Justice Bobbitt raised questions about *Hillmon*, citing with approval the dissenting opinion of Justice Traynor in *People v. Alcade*.<sup>10</sup>

A declaration of intention is admissible to show that the declarant did the intended act, if there are corroborating circumstances and if the declarant is dead or unavailable and hence cannot be put on the witness stand....A declaration as to what one person intended to do, however, cannot safely be accepted as evidence of what another probably did....The declaration of the deceased in this case that she was going out with Frank is also a declaration that he was going out with her, and it could not be admitted for the limited purpose of showing that she went out with him at the time in question without necessarily showing that he went out with her. In the words of Mr. Justice Cardozo. "Discrimination so subtle is a feat beyond the compass of ordinary minds. The reverberating clang of those accusatory words would drown out all weaker sounds. It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed."<sup>11</sup>

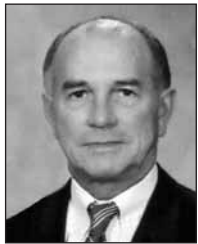
None of the learned justices in *Vestal* mentioned the "Tom Dooley" connection, if any of them were aware of it. If you are a folk singing lawyer, it's enough to make you "hang down your head and cry." ■

*Professor Underwood is the Spears-Gilbert Professor of Law at the College of Law, University of Kentucky. He is a co-author of Modern Litigation and Professional Responsibility Handbook (Aspen). For further reading regarding Tom Dula's case Professor Underwood recommends John Foster West's, The Ballad of Tom Dula (1970) and Lift Up Your Head, Tom Dooley: The True Story of the Appalachian Murder That Inspired One of America's Most Popular Ballads (1993).*

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# New State Bar Councilors

Judicial District 6A is now represented by **Gilbert W. Chichester**. Chichester attended North Carolina Wesleyan College and earned a JD from the University of Richmond. He has been in private practice in Virginia since 1975, and in North Carolina since 1977.



He is currently a senior partner with Chichester & Walker, PC. In addition to being active with the North Carolina State Bar, Chichester is a member of the Virginia State Bar, Virginia Trial Lawyers Association, North Carolina Bar Association, Halifax County Bar Association, and the American Bar Association. His civic contributions include work with the Lions Club and the VFW.

**R. Lee Farmer** is now representing Judicial District 9A. Farmer earned a BA from Elon College in 1970, then a JD from Wake Forest in 1973. He operates the Law Offices of R. Lee Farmer, PLLC, in Yanceyville. A member of several legal organizations, Farmer served as president of both the North Carolina County Attorneys Association and the North Carolina Municipal Attorneys Association. He is a member of the North Carolina Academy of Trial Lawyers, North Carolina Bar Association, Caswell County Bar, and the District of Columbia Bar. In 1998 Farmer was named Outstanding County Attorney by the NC Association of County Attorneys, and in 1984 received the Silver Beaver Award from the Cherokee Council BSA.

The new representative for Judicial District 10 is **David W. Long**. Long attended Duke University where he earned both his undergraduate and law degree. Except for two years with the US Attorney from 1969-1971, Long has been with Poyner & Spruill since 1967. Long is a fellow with the International Society of Barristers, and an associate with the American Board of Trial Advocates (president 2004). Long is active in the 10th Judicial District Bar (president 1997), the National Association of Criminal Defense Lawyers, and the North Carolina Academy of Trial Lawyers. Long has been named to the Best Lawyers in America—Business Litigation and Criminal Defense, and also Business North Carolina's Legal Elite.



**Joseph G. Maddrey** is the new representative for Judicial District 17A. Maddrey earned both his BA and JD from Wake Forest University. He currently is a senior partner with Maddrey Etringer Smith & Stroupe, LLP, in Eden, North Carolina. Maddrey once worked as a corporations attorney in the Office of Secretary of State. From 1988-1995, he served as a North Carolina State Bar Councilor, and was a member of the Disciplinary Hearing



Committee from 1996-2002. He is a former president of Morehead Memorial Hospital in Eden, and is former president of the Eden Rotary Club. Since 1991 he has been a certified legal specialist in real property-residential.

Judicial District 1 is now represented by **Donald C. Prentiss**. Prentiss earned both his BA and JD from Wake Forest University. From 1981-1985 he served as legislative counsel for the North Carolina Bar Association. Since 1985 he has been with the Elizabeth City firm of Hornthal, Riley, Ellis & Maland, LLP. For six years Prentiss served on the Board of Directors of Legal Services of North Carolina. He also dedicated five years to the Board of Directors of the North Carolina Association of Defense Attorneys, acting as treasurer for two years. Prentiss is also active with the Litigation Section Council of the North Carolina Bar Association. As part of his civic involvement, Prentiss has served on several boards including the Food Bank of Albemarle (president for three years), Elizabeth City Chamber of Commerce, and Albemarle Area United Way. Prentiss is also a member of the Elizabeth City Morning Rotary Club.

The new representative for Judicial District 16B is **C. Christopher Smith** of Lumberton. Smith completed his undergraduate work at the University of North Carolina at Chapel Hill and earned a JD from the University of South Carolina. Since his admission to the Bar, Smith has worked in private practice. In addition to his work with the North Carolina State Bar, Smith is past president of the Robeson County Bar Association. ■

## Tom Dooley (cont.)

### Endnotes

1. See *State v. Thomas Dula*, 61 N.C. 211 (1867).
2. 145 U.S. 285 (1892).
3. For a very interesting account of the sculduggery on both sides of the "v." in this case see Brooks

MacCracken, *The Case of the Anonymous Corpse*, 19 Am. Heritage 51 (1968).

4. Christopher Mueller and Laird Kirkpatrick, *Evidence*, 3d Ed. 824 (2003)."
5. *State v. Tom Dula*, 61 N.C. 437 (1868).
6. *The Ballad of Tom Dula* (1970) and *Lift Up Your Head, Tom Dooley: The True Story of the Appalachian Murder That Inspired One of America's Most Popular Ballads*

(1993).

7. *Holland v. United States*, 348 U.S. 121 (1954).
8. All of this from the website [www.geocities.com/Nashville](http://www.geocities.com/Nashville).
9. 180 S.E.2d 755 (N.C. 1971).
10. 148 P.2d 627 (Cal. 1944).
11. 14B P.2d et 633.